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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 00-3030 CA 11

GAIL ROUTH,
Plaintiff,
vs.
PHILIP MORRIS INCORPORATED,
("PHILIP MORRIS U.S.A."),
et al.,
Defendants.
_____/

Miami-Dade County Courthouse
Miami, Florida
October 2nd, 2003
Thursday, 8:30 a.m.

TRIAL - VOLUME 12

The above-styled cause came on for trial before the Honorable Herbert Stettin, Circuit Judge, pursuant to notice.

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APPEARANCES:
On behalf of the Plaintiff:
ANGONES, HUNTER, McCLURE, LYNCH & WILLIAMS
BY: Steven Kent Hunter, Esq.
-and-
KLUGER PERETZ, P.A.
BY: Stuart Silver, Esq., and
Keisha Harris, Esq.
On behalf of the Plaintiff

SHOOK HARDY & BACON, L.L.P.
BY: Kenneth J. Reilly, Esq.
On behalf of the Defendant, Philip Morris

SHOOK HARDY & BACON, L.L.P.
BY: William Geraghty, Esq.
On behalf of the Defendant, Lorillard

ADORNO & YOSS, P.A.
BY: Anthony Upshaw, Esq.
On behalf of the Defendant, Brown & Williamson

WOMBLE CARLYLE SANDRIDGE & RICE
BY: Jonathan Engram, Esq.
On behalf of the Defendant, RJ Reynolds

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I N D E X

Witness	Direct	Cross	Redirect	Recross
SANDRA WHEELER				
(By Ms. Harris)	1794			
GAIL R. ROUTH				
(By Mr. Silver)	1814		1910	
(By Mr. Upshaw)		1873		

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(THEREUPON, the following proceedings were had:)

THE COURT: Good morning, everyone.

MR. GERAGHTY: Good morning.

THE CLERK: Judge, we are still waiting for one more witness -- I mean juror.

THE COURT: Please be seated. Come on up, Mr. Silver.

(Thereupon, a discussion was held off the record, after which the following proceedings were held:)

MR. UPSHAW: While we are waiting, Your Honor, I think Mr. Geraghty has a motion.

MR. GERAGHTY: I had a question and a preliminary matter.

Is tomorrow the day we are supposed to be on the fourth floor?

THE COURT: Yes.

MR. GERAGHTY: In 4-2?

THE COURT: What courtroom tomorrow?

THE CLERK: I will find out.

THE COURT: All right. It will be 4-1 or 4-2.

MR. GERAGHTY: Your Honor, the issue I wanted to raise, from what the plaintiffs have told us, we understand that there will be three

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fact witnesses who will testify today. All of whom -- Ms. Routh is one of them. Other than Ms. Routh, they are people who know Ms. Routh.

And the one area that we are concerned --

THE COURT: I'm assuming these are before and after type witnesses?

MR. GERAGHTY: Yeah, I believe they are

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basically before and after witnesses. They may address one or two other subjects, but one of the issues we wanted to raise, when they were deposed, a number of them said things like, well, I believe that Gail was sick -- This was before her lung cancer was diagnosed.

They will say, I believe she was sick from sinusitis and bronchitis more often than what I believe the average person would be, and my recollection is she was sick a lot more when she was flying when smoking was permitted than she was after it was banned.

And I think that would be inappropriate.

THE COURT: Let's take up the first of them. That is, she was sick with sinusitis and bronchitis more often than the average person. I won't allow that.

MR. SILVER: If that was said, it wasn't

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something I intended.

THE COURT: Second, she seemed sick more often while flying is a factual observation. Why aren't they permitted to say that?

MR. GERAGHTY: I think it is an effort to introduce expert testimony through a fact --

THE COURT: It isn't -- It is based on personal observations.

MR. GERAGHTY: Okay. Fair enough, Your Honor.

THE COURT: All right.

One final thing, and then we can do it, he says we are ready.

Mr. Reilly, I have read those cases. I don't think you are correct. I think that the only case you have given me that addresses the issue of whether or not it is proper to come in on an expert having worked for the other side is a Fourth DCA case in Tomlian and Grenitz, which expressly permitted it under those circumstances. And the Supreme Court approval on different grounds simply didn't address that because it wasn't an important issue in the case. The Third DCA case is entirely different.

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MR. REILLY: But the Fourth DCA case points out that the way it occurred, after impeachment had occurred.

THE COURT: In this case everybody, including the defense, had raised issues concerning the fact that this is a paid expert who it was primarily for plaintiff, clearly within the ambit of reasonable way to counteract that fight. I'm satisfied your motion for mistrial was properly denied.

MR. REILLY: Okay. So, let me just get your ruling clear. It would be appropriate, then, to bring up on direct examination the fact that someone --

THE COURT: I'm not ruling -- I'm simply saying it was not inappropriate in this case.

MR. REILLY: Well, I guess I'm getting down to the situation exists in reverse with my

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first witness. Mr. Hunter hired Dr. Villa to testify in the only other tobacco case he's ever testified. I presume I can bring that out on direct examination.

THE COURT: Why shouldn't he be able --

MR. HUNTER: I think he should be. We have been doing that for 20 years or more.

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THE COURT: That means it must be right, of course.

MR. GERAGHTY: Your Honor, I apologize.

THE COURT: That is all right. Let's get it all out now.

MR. GERAGHTY: I didn't mention, one of the issues -- I heard your ruling. But the reason why I don't think it is appropriate for the fact witnesses to say Gail Routh was sick more often when she was flying is because the issue isn't --

THE COURT: Sick while flying while smoking.

MR. GERAGHTY: While smoking was permitted, it is not relevant because the claim is for chronic sinusitis and chronic bronchitis. Only a doctor can tell the jury that. They put the doctor on the stand yesterday to say that. So the fact that she may have suffered from more frequent bouts of colds --

THE COURT: If you are saying the illness she suffered from, these people can't comment on, absolutely true. But they can describe the symptoms.

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MR. GERAGHTY: The inference is going to be that they are going to be describing sinusitis and bronchitis.

THE COURT: They are only going to say what the symptoms are. They are not going to say she suffered from sinusitis or bronchitis. They don't have the expertise to say that.

Thank you.

We are ready. Bring in the jury.

(Thereupon, the jurors entered the courtroom.)

THE COURT: Good morning.

JUROR NO. 1: Good morning, Judge.

THE COURT: Good morning.

Please be seated.

Good morning, Ladies and Gentlemen.

JURORS: Good morning.

THE COURT: We have some housekeeping matters to take care of. There is going to be one change tomorrow. We are going to be sitting on the fourth floor rather than this courtroom. They have to use this courtroom for another purpose. I was unsuccessful convincing them that moving all the gear is going to be not worth the fight. They won. We are going

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to move for the day, so it will be the fourth floor. We will tell you exactly which courtroom. It will be one of the larger ones.

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All right.
Sir, plaintiff call your next witness.
MS. HARRIS: Plaintiff calls Sandra Wheeler to the stand.
THE COURT: Ma'am, please step up here.
Would you raise your right hand, ma'am.
Thereupon:
SANDRA WHEELER
a witness named in the notice heretofore filed, being of lawful age and having been first duly sworn, testified on her oath as follows:
DIRECT EXAMINATION
BY MS. HARRIS:
Q. Good morning, Ms. Wheeler.
A. Good morning.
Q. Would you please tell the jury your full name and address?
A. Sandra Wheeler, [DELETED].
THE COURT: Ms. Wheeler, you are going to have to sit up. As a matter of fact, I see we have a vest mic. If you would, would you clip

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that to yourself so we can all hear you?
THE VIDEOGRAPHER: Your Honor --
THE COURT: Wrong one.
THE REPORTER: If she could move her chair forward closer to the mic.
BY MS. HARRIS:
Q. Would you repeat your full name and address? I'm not sure the jury heard you the first time.
A. Sandra Wheeler, [DELETED].
Q. Ms. Wheeler, do you know Gail Routh?
A. Yes.
Q. How do you know her?
A. Gail lives across the street from me and she's my best friend.
Q. How long have you been friends with Gail?
A. Um, Gail moved across the street from me ten years ago. And during the course of the ten years of her living there, we gradually became best friends. But we have not been best friends, maybe the last five, six years.
Q. Okay. Now, Ms. Wheeler, I want to talk about the period of time that you knew Gail prior to her initial cancer diagnosis in 1999.

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Would you tell the jury about the Gail that you knew prior to her cancer diagnosis?
A. The Gail that I knew prior to diagnosis was -- She worked very hard. She flew a lot of flights, three days in a row, so I would watch her house while she was gone, because I could see out my window if lights were on at her house.
And so she worked a lot and was gone a lot, but I always knew the day she was coming home and I always knew her schedule. Most of the time. And would look for her to come home and go over for coffee. We spent a lot of time walking across the street to each other's houses.
We called and would say, "Can you come over? Do you want to come over for a little bit?"
So it was kind of a friendship in our

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homes that developed. We would sit and she would sit in my kitchen; I would sit at her house. And then we found we had a lot in common. And we both liked to travel. And we had both lived in Germany at the same time together. We were both married to military men, and we had a lot in common, so we started to say, let's go a few places together.

And we started to plan some trips, and she is a very energetic person and very ready to do the

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next thing and where could we go next. We both shared a love of movies, so we would go see a lot of movies together. And we started to see some plays together.

And at the time she was single, and I was not working, so we had at least the freedom to travel together. And, um, she lived a normal life, like, a fairly high energy life for someone who worked a lot and then fit in travelling and -- and, ah, going out -- just going out like a normal person would go out.

Q. How would you describe her personality?

A. Her personality? She's that best friend that everyone would want to have. She's the most loyal person you would ever find. If you were to go hand pick your best friend, that would be her.

She's -- she waits on people, makes sure you are the comfortable one. "What do you want to drink? Where do you want to go? What do you want to do?"

She's very funny. And that was one thing that attracted me to her. She's got a very, very quick wit. She's very funny and, um, she's very fun to be around. She has a circle of friends like you can't believe because people just are drawn to her

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and to her personality and she includes everybody in things.

She's a hostess who entertains a lot. A hostess who has people over at her house a lot. She is setting the table for everybody and cooking all day, knows how many people are going to be coming and her house is very much full of her friends around her.

Q. Okay. Ms. Wheeler, I want to talk about now, the time period during which Gail was initially diagnosed with lung cancer in 1999.

Did you see Gail on the day that she was diagnosed with lung cancer?

A. The day that she received her diagnosis, yes. I saw her.

Q. Right. Would you tell the jury about that day, please?

A. I had planned a morning jog with a group of friends, and Dr. Bartels was in that group of friends. And Gail was flying home from a trip. And that was the morning -- or when she arrived off from her flight, she called Dr. Bartels and Dr. Bartels delivered the news to her. And Dr. Bartels knew that she was going to be meeting me to jog that very morning. And with Gail's consent, told me about the

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diagnosis.

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So I arrived to go jogging with a group, and Dr. Bartels said to me, "Could I speak to you for a minute over on the side?"

Then she told me. She told me that Gail's diagnosis was cancer. And then she said, "Gail is on the way home right now. She's landed in Charlotte and I have already told her the news, and I don't think Frank is at home, he's not, so, she will be arriving at her house alone."

So I said, "I'm on my way over there." So I left the jogging group and got in my car and drove to Gail's house. And -- and -- and -- I have a key to her house. So I went in her house and watched through that window and watched through that window. And then she pulled up in her uniform and got out of her car.

And then I just ran out her door and we just cried a long time and held each other and held each other and held each other. And then went into the house and I spent that morning with her.

And we just cried a lot, because we didn't know what was coming or what this entailed, neither of us had ever been through anything like this. So we just were crying a lot that day. And holding

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each other.

Q. Do you know if some period after that Gail had to undergo surgery to have a portion of her lung removed?

A. Yes. It wasn't long after that that -- right away, that they performed that -- Dr. Claxton performed surgery on her.

Q. What was Gail's emotional demeanor that you observed leading up to the day of that surgery?

A. Well, she definitely, we notice -- I noticed this through all of it, she remained strong for her friends.

She's that strong person that wants her friends to not feel bad about anything. So she remained strong.

But the night before surgery, we planned a little get together at her house. I don't think we planned it, or she planned it, and so we had a gathering of her friends the night before surgery, the night before she was to go in, anyway, and that was the night before surgery. And we all were trying to be supportive to her and upbeat.

And then at some point Gail and I went in the kitchen, her kitchen together, and at that point she started to break down and -- she had been so

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strong up until that point, and she was very much just shaking and sobbing. And I said, I haven't seen that, that out of her.

So I said, "What is it? What is it? What is it?"

And she was just, just sobbing. She indicated she didn't think she was going to make it.

She said, "I don't think I'm going to make it."

I said, "What are you saying?"

"I feel like I'm going to die, I'm going to die."

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I said, "Why are you saying that?"
"I'm going to have surgery to remove this."
She said, "I'm not going to make it. I'm not going to make it."
And that was so upsetting. We were both just crying and sobbing in that kitchen. And others started coming in wondering what had happened because she went from one room to another, and had this reaction all of a sudden to -- to feeling as if she -- or indicating to me she felt like she was not going to make it.
Q. Did you visit Gail in the hospital following her surgery?
A. Yes. I visited her every day that she was in the hospital. I believe it was 14 days in a row. She was in the hospital in Asheville, and we live in [DELETED]. I traveled 14 days in a row. It is about a 40-minute drive to the hospital.
And spent 14 days with her and with Frank. And we were at her side for 14 days. Whether she was sleeping for the day or not, we sat in there.
Q. What was her emotional demeanor during the time that she was in the hospital?
A. She was pretty upbeat. She was in a lot of pain, and medicated a fair amount. But the times that she wasn't, she spent getting to know the nurses, and how many children every nurse had and where did the nurse live, the history of every person who came in her room. She was her same little caretaker friend with all of the people around her, finding out about their lives and taking the focus off from her life.
Q. Did you see Gail during the period of time that she underwent chemotherapy or radiation treatment?
A. Yes. Yes. She started chemotherapy and radiation, and I saw her through that. And saw her get sicker and throw up a lot. And unable to eat from the radiation being so close to her esophagus.
And I went with her to some of the radiology treatments. Because they were all outpatient. And went with her to some doctor visits.
Q. How was Gail -- How was her emotional demeanor that you observed while she was going through those treatments?
A. She tried to be real strong for herself and for everyone around her. And I realized we -- we could cry every day of our lives, when Gail and I get together. But that wasn't what we were going to do. And we were going to try to do things as we could do them and fit things in.
And she -- She had her times a certain subject would come up, and that we would be wiping tears on that day. But she did not focus on her disease, and she indicated she did want to talk about it very much. So she did not want to be in like a support group and she did not want to talk about having cancer all of the time.
So we did not.

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Q. Ms. Wheeler, I want to talk about the period of time after Gail finished her cancer

treatment, her initial cancer treatment, but before she learned of the recurrence in December 2002.

How were Gail's physical abilities during that time that you observed?

A. Physically she was much more limited to what she was able to do, and we tried to go on some trips and do a lot of things. But I soon learned that what we would -- thank you so much.

What we would plan on doing for the day ended up to be -- we would plan on maybe six things to fit in that day, we would get through two or three of them and have to go back.

And then in order to fit more in, I learned to drop her off at the front door, wherever we were going, and to limit how far she was going to be walking. Because her breathing would start to be labored and nausea started taking kind of a role in how our day was going to go. Because she was nauseous or she wasn't, that particular day, and then we would take it from there.

And also we would have to take into consideration that her mornings would be long, because she would have to get up, take a shower, and then sit there for about 45 minutes to an hour before she could continue to get ready for the day.

Her breathing would just be very labored. It would limit what you could do for the day. It would be -- she -- she indicated she did not want to lose -- she's that type of person -- she didn't want to lose her independence. You tried not to do a lot for her, but yet you had to. And you had to take into consideration that she was not going to be walking that far, she wasn't going to be doing as much as you had planned.

Q. Let's move to the point when Gail learned of her recurrence in December of 2002.

Did you accompany Gail to the doctor's appointment that she had with Morelock, or Dr. Morelock, to get her test results?

A. Yes.

Q. What was --

A. Frank was flying or, I believe, he was flying at the time, and we knew that this was the doctor appointment that Gail would be getting results of her tests for the recurrence.

So I drove her to Dr. Morelock's office in Asheville, and went in the room with her, and Dr. Morelock came in, and delivered the news that, yes, it was a cancer in her other lung, and we just both sat there and listened to her talk. And she got

down and said, "Well, I will be right back. I will leave the two of you alone."

It was only until that door closed behind her for us to -- for us to cling to each other and cry. I realized what she had just -- the news that she had just delivered, and we didn't say much. We just cried and cried.

And then Dr. Morelock came back in, she

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said, "Well, I wondered if the two of you understood what I said because you both just sat there. It is good to see that you are crying."

That was that. We drove home with that news.

Q. Did you observe a change in Gail's emotional state after she learned of the recurrence of her cancer?

A. Yes. She definitely had a different outlook after the second recurrence. She almost was preparing herself right away for -- Well, let me put it this way, she began to think about giving her things away. She began to think about who she could give this to and who she could give that to.

And she -- I had gone over to her house for coffee one morning, and I saw a pile, a stack of boxes in her dining room. And I said, "Well, what

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is that?"

They had addresses on them. I could see the first top two had addresses and they were all taped up.

And she said, "Well, those are going to the post office."

There were probably six or eight boxes.

I said, "What are you mailing off?"

And she said, "Well, my cousin once mentioned that she liked a jacket of mine, so I'm mailing that to my cousin. And a friend of mine mentioned a sweater that she liked when I had it on. That is the box with the sweater in it."

She had gone through all of those, anyone that had complimented her on something, they were getting that item.

She had remembered in her mind who liked what of hers, she had boxed those things up and was mailing that -- those off to people in her life.

And --- excuse me.

She had always told me that in her -- in her will I was getting her mink coat. She has a mink coat.

And last Christmas, she -- about the week before Christmas, and she said, "I'm going to give

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you that mink coat early."

I said, "You don't have to. You don't have to. You know, don't worry about. I know I'm getting that coat of yours."

"No, no, no. I want to give it to you. I don't want to just leave it to you. I want to give it to you."

So I just said, "Well, you know, don't feel like you have to."

And then Christmas Day, her son Ramsey was at her house. He comes on Christmas every year. She called and said, "Come on over, I have got something for you."

I know that it was that mink coat. And I took that long walk across the street, and got into her house.

She said to Ramsey, "Go get it, Ramsey, go get it."

He came out with that mink. And she put

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it on me. She said, "Well, it fits you a lot better than it fits me."

So we just were hugging. And crying. With me, with that mink coat on of hers.

And I thought all of the time that she talked about that mink coat, and here we are

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Christmas Day, and she's giving it to me.

And she would -- she started having her jewelry out, who was going to get her jewelry. And she doesn't -- her son is -- Ramsey is not married. She wanted to save something in case he does get married. She doesn't have grandchildren, so what was she going to save in case she did have grandchildren, they would never know her.

And she sent some jewelry to my mother, whom she knows.

So it was kind of a matter of her deciding that, finding things that meant things to her and to give those away to people.

Q. Is Gail still the physically active person that you once knew her to be when you -- before the cancer diagnosis?

A. No. She -- she doesn't have people over for dinner anymore. I do have lunch over at her house fairly often yet, but it is -- Frank will go get something, some sandwiches, and bring them in, and Frank will prepare something, and she -- she spends a lot of time just on her couch.

We come over, Frank will get you coffee, get you something. Gail is just on her couch a lot. And she has help in the house that comes in and does

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things for her. And if we -- we haven't gone to a movie -- If we do plan anything, it has to be early in the day so that -- we wouldn't ever go to a nighttime movie anymore. That is too late in the day. She's -- she's too worn out by that time to do something.

We did go a year ago. We had season tickets to plays that we went to a lot. They were matinees. This year we did not buy the season tickets.

We did go to one play. We decided to go to one, a matinee. She had to leave part way through that because she didn't feel well. She didn't come back for the remainder of the play, because we had someone else with us.

But we don't even talk about planning a lot anymore. It is just like we are just going to -- I just know we will spend time together and we -- we are limited to where we can go and what we can do. But she's in her own house, just does less and less.

Q. Without telling me exactly what Gail told you, is her eventual death from lung cancer a subject that the two of you have talked about?

A. We have not really had a big discussion

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about it. Just, I have been there for all of the stages of it, so we know what is coming and we know what it is. And she has -- she will say fairly often, just in the course of conversation, "Well, I

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don't have long to live, so I may as well get this in," or "I'm going to try to get that in. I don't have long."

She's mentioned about her son not being married and wanting to know who he will marry and will we have children in reference to her not living to see them.

MS. HARRIS: Your Honor, may I have a moment to confer, please?

No further questions.

THE COURT: Cross-examination.

MR. UPSHAW: Your Honor, I don't have any questions.

THE COURT: Members of the Jury, any questions of the witness?

Miss Reporter, if will you come sidebar, please.

(Thereupon, the following proceedings were had at sidebar:)

THE COURT: Can you ask Sandra if Gail's doctor broke the news to her through a

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telephone call or her doctor went to Gail's house to tell her about the bad news?

I think the question is, did -- what was her doctor's name?

MR. REILLY: Bartels.

THE COURT: Bartels.

MR. REILLY: Bartels.

THE COURT: Did Dr. Bartels tell her the news that she had cancer in person or by telephone?

That is the question. I will ask it that way.

If you say her physical activity was limited, how was she able to go through her things, pack them up to send them to different people?

Okay.

(Thereupon, the sidebar was concluded and the following proceedings were held in open court:)

THE COURT: Ms. Wheeler, if you know, how did Dr. Bartels tell the plaintiff, Ms. Routh, that she had cancer? Was it through a telephone call or in person?

THE WITNESS: I believe it was a telephone

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call.

THE COURT: A telephone call?

THE WITNESS: I believe, yes.

THE COURT: If you say Ms. Routh's physical activity was limited, how was she able to go through her things, pack them up and send them to different people?

THE WITNESS: Oh, she was able to do that much.

THE COURT: Any other questions?

Thank you, Ms. Wheeler. You can step down.

The next witness.

MR. SILVER: Your Honor, we will call Gail Routh to the stand.

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THE COURT: All right.
MR. SILVER: May we approach for one moment?
THE COURT: Yes.
Ms. Routh, if you would please stand and raise your right hand.
Thereupon:
GAIL R. ROUTH
a witness named in the notice heretofore filed, being of lawful age and having been first duly

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sworn, testified on her oath as follows:
THE COURT: Per the instruction, you need to try to keep your voice up.
THE WITNESS: Okay. I will try.
DIRECT EXAMINATION
BY MR. SILVER:
Q. Good morning.
A. Hi, Stuart.
Q. Would you tell the Court and the jury your full name and where you live?
A. Gail Renee Routh. I live at [DELETED].
Q. I ask you, I know it is difficult, to the extent you can, keep your voice up. Maybe sit forward in the chair.
THE COURT: Mr. Silver, how about that vest mic?
MR. SILVER: I believe we may have a problem, given the distance from the camera.
THE WITNESS: I will keep my voice up.
MR. SILVER: Is it possible --
THE COURT: Mr. Silver, she will try to keep her voice up.
THE VIDEOGRAPHER: I have a mic I'm going to put on her.

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MR. SILVER: If we can have a moment, he's going to try to accomplish this.
Thank you.
THE COURT: Okay.
THE VIDEOGRAPHER: This isn't the PA system, this is strictly the video.
BY MR. SILVER:
Q. Do you have any residence other than the one in [DELETED]?
A. Yes, I do.
Q. And where is that?
A. At [DELETED]

Q. Tell the jury what the circumstances are that you happen to have two residences with your husband.
A. I moved to [DELETED] when I was single and bought this house in [DELETED].
Q. And is it in [DELETED] or [DELETED] where you have received most of the medical care and treatment since your diagnosis of cancer?
A. [DELETED].
Q. Tell us, if you would, about the members of your family, how many brothers and sisters you have.

1816

A. I have two brothers and three sisters, one

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deceased.
Q. The names of your brothers?
A. Murray and Chris.
Q. And your sisters?
A. Lynn, Judith, who is deceased, and Jeanie.
Q. Are any of your parents alive today?
A. No. Both.
Q. Do you have any children?
A. I have one.
Q. And his name?
A. Ramsey Ross.
Q. How old is Ramsey?
A. Thirty-five.
Q. Where does he live?
A. [DELETED].
Q. And is he employed full-time?
A. Yes, he is.
Q. He's working at the present time?
A. Yes, he is.
Q. What is his position?
A. He's a -- for lack of a better -- short term investor for a firm in DC.
Q. How often do you get to see Ramsey?
A. Several times a year, I would say.

1817

Q. Can you tell us, there has been some testimony in this courtroom about the disease known as the Alpha-1 antitrypsin deficiency.
Are you familiar with that?
A. To some extent.
Q. Have you been tested to determine whether or not you have the Alpha-1 antitrypsin deficiency?
A. Yes, I have.
Q. What is your understanding of the status of your condition?
A. I'm a carrier, heterozygous.
Q. What does that mean?
A. I have inherited just one gene, that I don't have the Alpha-1 deficiency, but I am a carrier.
Q. Do you have any symptoms that have been attributed to Alpha-1 by any of your doctors?
A. No.
Q. Before you started flying for Allegheny and then US Airways, did you have any respiratory difficulties that limited you in any way?
A. No.
Q. Tell the jury, please, where you grew up?
A. Crown Point, New York.
Q. Where is that?

1818

A. Upstate New York.
Q. How large a town?
A. 2,500 people.
Q. You went to school there?
A. Yes, sir. Uh-huh.
Q. Tell us about the schooling that you had in Crown Point.
A. The school housed kindergarten through 12th grade.
Q. Did you graduate from high school there?
A. Yes.
Q. While you were in high school, were you

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active in any school activities?
A. I played the usual sports.
Q. Were you a cheerleader --
A. Yes, sir.
Q. -- for the high school?
A. Yes.
Q. What kind of sports did you engage in when you were in high school?
A. Soccer, baseball, softball, cheerleading, basketball.
Q. And the physical exertion that is involved in those sports, they didn't cause you any difficulty in breathing or coughing or anything like

1819

that?
A. No. None.
Q. Other than organized sports, the ones you have mentioned, did you engage in other physical activities?
A. Oh, sure. Ice skating. We are very far north. A lot of bike riding.
Q. Now, did you go to further your education beyond high school?
A. Yes.
Q. Where did you go?
A. A semester at Adirondack Community College, Glens Falls, New York.
Q. Did you go to school beyond that at some later time?
A. Yes.
Q. Where was that?
A. University of Maryland.
Q. How long did you attend the University of Maryland?
A. I attended Maryland on and off for several years.
Q. And while in college, the two schools that you just stated for us, were you at that time very active as well physically?

1820

A. Yes.
Q. The same type of activities you have already described for us?
A. To some degree, yes.
Q. Gail, when was it that you first had an interest or curiosity about becoming a flight attendant?
A. When I was in junior high.
Q. What brought that about?
A. I had a cousin who flew for Eastern as a flight attendant.
Q. And what was it about becoming a flight attendant that was appealing to you?
A. The travel, the mobility, meeting new people in new places.
Q. Did that interest grow as the years went on?
A. Yes.
Q. And when did you first decide that you were going to apply for employment with the airlines as a flight attendant?
A. When I was going through a divorce, and I knew I needed employment, that would seem a logical

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choice.
Q. Where did you fly?

1821

A. Allegheny and Eastern.
Q. Were you accepted by one of those two?
A. Actually, both, yes.
Q. You chose Allegheny?
A. Yes.
Q. Allegheny Airlines is today US Airways; correct?
A. That's correct.
Q. Has your employment been with one employer throughout your career as a flight attendant?
A. Yes.
Q. The names may have changed, but it was the same employer?
A. Right.
Q. Now, when you applied for the position of flight attendant and wanted to be trained in that capacity, did you have to undergo a physical exam?
A. Yes, we did.
Q. There were physical requirements to make sure that you were healthy?
A. Yes.
Q. Was there any obstacles to you becoming a flight attendant at that time?
A. No.
Q. There were physical requirements inherent

1822

in the job of flight attendant, too; is that right?
A. Yes.
Q. Describe to the jury, if you would, please, some of the activities that you would have to engage in as a flight attendant that are physical in nature.
A. Well, dragging a suitcase, carrying a suitcase is one. You have to push heavy beverage carts, meal carts up the aisle and physically lift liquor kits. We place them in different cabinets, one shelf to the other. Helping passengers with their luggage. Those kinds of things.
MR. SILVER: Your Honor, may we have one moment to switch her microphone?
THE VIDEOGRAPHER: Sorry, Your Honor.
MR. SILVER: Thank you.
BY MR. SILVER:
Q. Can you give the jury some idea of the weight you understand you had to move in performing the tasks you just described?
A. The beverage carts weigh sometimes over 200 pounds. They were heavier than the meal carts. Sometimes around 300 pounds each. From 300 heavier. It depends on how much you had on the cart. Sodas, cans, ice.

1823

Q. And at the time that you served as a flight attendant when you were training in your first years of employment, did you have any difficulty in performing the physical tasks of the job?
A. No.
Q. Did you require any assistance from anyone?

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A. No.
Q. How long was the training program that you went through, Gail?
A. Approximately, it was five weeks.
Q. What were some of the areas that you were trained in?
A. Well, safety, customer relations, organization, health, CPR, first aid. We had to renew our contracts, legalities, there is --
Q. How --
A. I'm sorry. I'm just trying to think of others. It has been so many years. I guess that about covers it.
Q. How old were you when you went to work as a flight attendant?
A. I was 23.
Q. What year was that?

1824

A. 1972.
Q. Can you tell the jury, please, which aircraft it was that you flew on first?
A. Convair 5880.
Q. How large a plane was that?
A. It held 50 people.
Q. Was there one cabin, one section, or were there several cabins?
A. No. Just one.
Q. One. And how many flight attendants served that plane?
A. One.
Q. What were the typical kinds of flights that that Convair aircraft flew with you as a flight attendant?
A. We were a regional carrier. Mostly upstate -- in the northeast through quite a few landings, all of the northeast cities that Allegheny serves.
Q. Insofar as your employment was concerned, did you have to fly more than one flight each day?
A. Oh, yes.
Q. Describe for the jury, generally speaking, when you were working for this regional carrier, Allegheny, how often you would be flying in the

1825

course of a day or a couple of days.
A. They could legally schedule us up to 16-hour days, so if you had a 16-hour day, you knew that you were going to spend at least eight hours in the air.
So I -- On a good day, as a flight attendant, you might have four landings. But a normal -- on a Convair 580, nine or ten would probably be the norm.
Q. Each day that you were working?
A. (Nods head affirmatively).
Q. Was smoking permitted on the Convair at that time?
A. Yes.
Q. Were there any restrictions on where one could smoke on the plane?
A. No.
Q. Were there any restrictions on the number of people who could smoke?

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A. No.
Q. Would you give us the benefit of your recollection as to how prevalent smoking was in that plane when you worked on it in your first year of employment?
A. Yes, it was -- My recollection is just

1826

about everybody smoked. The cabin was one big haze of smoke. I mean, it was more popular to smoke.
Q. Did your duties require you to work throughout the cabin?
A. Yes, sir.
Q. You were serving passengers throughout the cabin?
A. Yes.
Q. What kind of service was -- were you involved with on that airline?
A. Food and beverage.
Q. What proximity or how close were you to the passengers that you would serve?
A. Just inches. I had to set up trays. I had to bend across them from here to there. Just inches.
Q. I believe you were in the courtroom on the morning of the trial when we had the demonstration with the three airline seats.
A. Yes.
Q. And you saw the demonstration as to the proximity between the flight attendant and the passengers?
A. Yes.
Q. Did that resemble the kind of proximity

1827

that you would have in the plane?
A. Exactly.
Q. Were there occasions when you would have yourself or articles of clothing burned?
A. Yes, a few times. Not intentionally.
Q. But by cigarettes?
A. Yes.
Q. And tell us what the conditions were like in terms of how the smoke that you described affected you.
A. Affected me? Red eyes, coughing, hacking, sneezing a lot. It bothered me, like a frog in my throat.
Q. Could you estimate for us or give us a range of time that these flights on the Convair aircraft, the duration of the flights?
A. Let me see. On the Convair, they were the shorter flights. A lot of landings a day. An hour, maybe more, maybe less.
Q. So give us your best estimate. Again, I'm asking for an average or a range, depending upon which one is easier for you to provide. Give us the best estimate, the amount of time you were actually in the air on any one of these Convair flights.
A. In the air? On an average, on a Convair

1828

flight, probably close to an hour.
Q. And would that be true for the days when you would fly up to eight flights?
A. Yes. Yes. An average.

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Q. And aside from the time when the plane would ascend or descend, was smoking permitted throughout those flights?
A. Yes.
Q. What observations did you make, if any, about the smoke and evidence of the smoking in the interior of the plane?
A. Well, smoke didn't have anywhere to go. It was -- from the cigarette it went up and it just stayed above the ceiling. I mean, not above the ceiling, on the ceiling, on the walls. It was just prevalent throughout the cabin. It had nowhere else to go.
Q. Did you observe any other indication of the fact that there had been smoking in the plane either during or after the flights?
A. Yes. My uniform always reeked of smoke and I used to have to go home and shower and wash my hair because I smelled like smoke.
The airplane had stains on the walls, and the little white napkin things they put on the back

1829

seats, they always had particles on them. Just, people left the aircraft, the residue was still there, a lot of dark staining throughout the outlets.
Q. Did there come a time, Gail, when smoking was designated for particular rows of seats?
A. Yes.
Q. When did that occur, if you remember?
A. I believe it might have been 1973. I'm not quite sure.
Q. A year or so after you started working?
A. Yes, uh-huh.
Q. And tell us what you recall about the way in which smokers and nonsmokers were separated in the cabin of an aircraft.
A. Well, they had little placards and little signs. The agent responsible for working that particular flight would determine where smoking started and where it stopped. And he came in and placed a sign accordingly. Sometimes they had to be readjusted on demands of people smoking or not.
Q. Where would they place the sign?
A. Toward the rear.
Q. Physically how would they attach the sign?
A. Little stick pins they would put in the

1830

back on the seats.
Q. The chair backs?
A. Yes, chair backs. So they could just move them very quickly.
Q. Was there any other way that separated the section designated for smokers from the section designated for nonsmokers?
A. No.
Q. Was there any other barrier to protect nonsmokers, those who expressed a desire for a nonsmoking seat, from the smoke that was emanating from the smoking section?
A. No.
Q. Would you please share with the jury your observation of the smoke and where it would be

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present in the years after there was a designated smoking section and nonsmoking section?

A. Well, of course, it was more concentrated in the smoking, but the smoke was prevalent throughout the cabin, because smoke doesn't stay just where it is supposed to. There was always the presence of smoke in the cabin. And since flight attendants had to work the whole cabin, you were always in the smoke. There was no way of escaping it.

1831

Q. So once the separation of smoking seats from nonsmoking seats was made, that didn't in any way change your responsibility insofar as being throughout the cabin?

A. No.

Q. Now, you shared an observation about the smoke in the aircraft that we discussed already, the Convair.

Was there any difference in that observation that you made over the years in other aircraft on which you flew for US Airways?

A. No.

Q. Identify for the -- for us, please, some of the other aircraft that you flew while employed by US Airways.

A. British Aircraft 111. DC-9. 727. 737-200. 737-300. MD-80. 767. 757. And twice I flew an Airbus 330.

Q. Now, some of these planes are the so-called wide bodied aircraft?

A. Two are, yes.

Q. And each of those plane, I would imagine, has a different capacity in terms of the number of passengers that could be seated?

A. That's correct.

1832

Q. So after the Convair, the next plane that you worked on was which?

A. British Aircraft 111.

Q. Is that a larger plane than Convair?

A. A little bit, yes, sir.

Q. Did there come a time when you worked on flights that were different in length than the Convair flights?

A. Yes.

Q. When was that?

A. Probably the '80s.

Q. And how was it different?

A. It held more people. It just was sleeker. DC-9, of course -- I'm sorry. The late '70s. About 110, 100 people. And longer in length.

Q. In terms of duration of flight, how did it do?

A. A little longer flights, depending upon the airplane.

Q. Did there come a time when Allegheny, which became US Air and then US Airways, was no longer a regional air carrier?

A. Yes.

Q. When did that occur, if you recall?

A. I believe when they bought PSA in

1833

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California, Pacific Southwest Airlines. Or it could have been when the merger with Piedmont, they were designating that a trunk carrier. I really don't recall.

Q. Give us an approximate time frame.

A. I would say '80s.

Q. And when that occurred, did the types of flights or destinations that you flew on as a flight attendant change?

A. Yes.

Q. How so?

A. We acquired 737s. 727s. 737-200 and 300 series. They were bigger in capacity and flew longer -- a little bit longer distances.

Q. Give the jury some of the examples of the routes that you would take different than the shorter regional routes.

A. We would leave for the west coast trips, Arizona. Milwaukee. Kansas City. Texas. Those kind of routes.

Q. During your career you were based in a number of places; is that correct?

A. Yes.

Q. But regardless of the base, the job essentially was the same?

1834

A. Yes.

Q. Was the job essentially the same regardless of aircraft?

A. Yes.

Q. Were there times that you could try to exercise a preference as to what station in the aircraft you wished to work?

A. Yes.

Q. And explain to the jury where that was and why you chose that airplane?

A. Well, every month, the third week of the previous month we have to bid a schedule for the next month, and it is based on seniority. If I'm saying, there are 300 of us in a base and I'm number 150, I know that I can bid up to 150 times. I may get -- I may get my first choice. If I'm senior enough, I may get my second choice.

It depends on seniority, how long you have been flying and how senior you are at that particular base.

Q. Well, once you enjoyed the status of a more senior flight attendant --

A. Yes.

Q. -- did you exercise that seniority to try to opt for certain kinds of flights or certain

1835

locations for work within the aircraft?

A. Yes.

Q. Explain what you preferred in that regard and what you did.

A. I preferred the lead position.

Q. Where was that?

A. In the front.

Q. And did you always get that?

A. No.

Q. Over your career, how often would you say you were able to fly in the lead or front position?

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Roughly.
A. Roughly, maybe 25 percent.
Q. Why was it that you preferred the lead or front position when you had the opportunity to get it?
A. There was an increase in pay, hourly wage.
Q. And to what did you attribute that? Was there different responsibilities?
A. Yes. If you are the lead flight attendant, you are responsible for the whole cabin, coordination and the whole service in the cabin, you are responsible.
Q. So on flights where there is more than one flight attendant, the lead flight attendant is the

1836

supervisor of the flight attendants, so to speak?
A. Right.
Q. And that person would be paid more for that?
A. Yes.
Q. So when you could opt for that position, that is why you did it?
A. Yes.
Q. Now, tell me, was your observation as to smoke conditions in the plane any different when you would be able to achieve or acquire the position of lead flight attendant on any particular flight?
A. No. Because you are always a presence in the cabin, whether you are lead or other positions, you are -- It was just all around you.
I mean, because it didn't have anywhere to go.
Q. Were there occasions when the cabins were separated into classes?
A. Yes. That wasn't until the merger with Piedmont, which is when -- 1989.
Q. '89.
So the first 17 years of your flying career there was just one class?
A. Just one class.

1837

Q. And it was one big coach class?
A. One big coach class.
Q. And then in the 19th year, I think, or the 18th year, pardon me, of your career, that is when you first worked in an environment that had a separation of first class and coach?
A. Of -- Yes, somewhat.
Q. Did they allow smoking? Was smoking permitted in designated areas of the first class as well as the coach section?
A. Yes.
Q. So regardless of position, you were in a smoking area?
A. Yes.
Q. When you started working on these aircraft that were larger and were -- the flights were longer in duration, did you find that your reaction to the smoke was the same or different than that which you described on the Convair for the jury?
A. It was the same. I always had the same coughing. I remember the most -- I remember coughing a lot. Coughing a lot. Sneezing. Typical

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runny eyes. But I wasn't alone.
Q. Well, were there occasions when you sought out medical care for those conditions?

1838

A. Yes. When I got sick.
Q. What was done for you by physicians who treated you back in those -- I'm talking now, '70s and '80s, let's say.
A. Usually prescribed some type of antibiotics.
Q. Did you become aware of the conditions from which you were suffering back then?
A. The reasons why?
Q. What it was, what illness that you had?
A. Yes -- yes.
Q. What was that?
A. Sinusitis, bronchitis.
Q. And those were words that were used by doctors that were treating you?
A. Yes.
Q. Were there -- Tell me about the frequency that you would have these sinusitis and bronchitis events.
A. It seemed to increase over the years. I went to, it seems like, a lot of doctors. Gradual increase as the years went by.
Q. Did you maintain any records from any of the physicians that you saw back in the '70s and '80s?

1839

A. I kept many years records, but how far back, I can't say. I don't think the '70s I have any at all.
Q. So although you don't have documentation of the doctor visits in the '70s, you would say that you were getting the kind of care that was provided to you later on for bronchitis?
A. Yes.
Q. And sinusitis?
A. The same. The same.
Q. Now, tell us, different than the frequency of these episodes, how long would the symptoms last?
Do you understand what I'm asking?
A. Yes, I do.
They could go on for weeks sometimes.
Q. When you say "weeks," what are you referring to?
A. It could be -- I remember a bout of bronchitis lasting maybe a couple of months.
Q. Did this happen in more than one year, Gail?
A. I don't recall.
Q. At a time that you saw physicians in North Carolina having moved to Marion --
A. Yes.

1840

Q. -- did you provide a history to one or more physicians about those episodes of bronchitis and sinusitis?
A. Yes, I did.
Q. And at that time was it -- were you describing those conditions -- either one of those conditions as chronic to the physicians that you

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saw?
A. Yes.
Q. And was that based on what doctors who had treated you had told you earlier?
A. Yes.
Q. Tell us about, if you would, please, the flying that you did -- Let me back up one.
You flew international flights as well; is that correct?
A. Yes.
Q. And there came a time before you started flying internationally that there was a smoking ban for flights of two hours or less, do you recall that?
A. Excuse me. Yes.
Q. By that time, were you still flying flights that were two hours or less or were you flying the longer Transcontinental flights?

1841

A. We -- Our trips were such, they were both. We didn't have strictly trips that were Transcontinental and then -- They were mixed up.
Q. Let's say between 1988 and the time that you started flying internationally, were there flights that you flew on that still were allowing smoking, based upon the length?
A. I believe so.
Q. Now, an opportunity arose for you to be able to fly on a program known as the wet lease program; is that correct?
A. Yes.
Q. Would you explain to the jury what the wet lease program was and why you were interested in it?
A. It was a partnership with British Airways from Charlotte to London and Baltimore to London, and it was based in Charlotte. It went according to seniority. They granted us basically our -- they flew our airplanes, our crews. We wore their uniforms, the flight attendants did. It was a three-year contract, and you applied every year.
Q. So although your employer was US Air, you were wearing a uniform that said "British Airways" on it?
A. Exactly.

1842

Q. Were you trained in any rules and regulations of British Air to perform that task?
A. Yes.
Q. And you said that you applied for the position and you had to sign on for a year?
A. At a time, yes.
Q. Then you could reapply?
A. (Nods head affirmatively).
Q. And for how many years did you work on the intercontinental flights?
A. Three years.
Q. And when was it that you -- the wet lease program that you were on ended or when did you stop flying on it?
A. It started January 1993 and ended in May of '96.
Q. In those years, Gail, was smoking permitted on those flights?

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A. Yes.
Q. What aircraft did you fly on?
A. 767-200.
Q. How large were those airplanes?
A. It holds 210 people.
Q. Can you tell the jury, please, on average or within a range, what percentage or how many

1843

passengers were smoking on those international flights that you worked?
A. I would say they -- I would say on an average, those flights, probably 30 to 40 percent, maybe.
Q. And, again, that is an average?
A. That is an average, yes.
Q. Now, if you were to describe the conditions of smoke in those aircraft, in that aircraft, for those years, would it be the same or any different than what you already described?
A. It was only different in the fact that it was -- the trips were of longer duration, eight to nine hours. But that smoke was prevalent in the cabin.
Q. So throughout the eight to nine hours smoking was permitted?
A. Except for take off and landings.
Q. And how much time, generally, was involved in a take off or a landing in those, if you recall?
A. Well, they usually turn on and off at 10,000 feet, which was perhaps 10 minutes.
Q. So actual air time, 10 minutes ascending, 10 minutes descending, would be the amount of time smoking was permitted generally?

1844

A. Yes.
Q. Were there rare occasions the No Smoking sign would go on during the flight?
A. Rare times when oxygen was used.
Q. By a passenger?
A. Yes.
Q. But otherwise there were no reasons, that you can recall, where the No Smoking sign would be on during the course of the flight?
A. (Nods head negatively).
Q. And those who choose to smoke could smoke?
A. That's correct.
Q. Did you have occasion to observe, either on these international flights or the domestic flights that you told us about earlier, that there were people who expressed a preference for no smoking and, in fact, sat in a no smoking seat who, nevertheless, smoked during the course of the flight?
A. All of the time.
Q. All of the time? Give us your observations in that regard.
A. Well, sometimes they were married to a spouse who didn't smoke, and they chose to sit with their spouse, but they knew there were some seats

1845

available, hopefully, for smoking. So as soon as they -- there was a steady stream of passengers walking to the back trying to ask people sitting in

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the smoking section if they would mind standing up while they could have a cigarette and then go back to their seat. This went on through the whole trip.

Q. So -- And was that more usual than unusual or vice versa?

A. No. It was more usual and it can cause some stress onboard the airplane.

Q. So then the number of people who actually smoked would be more than the number of people who asked for --

MR. UPSHAW: Objection. Leading, Your Honor.

THE COURT: Sustained.

Don't answer.

BY MR. SILVER:

Q. Gail, you said that the flights were nine to ten hours on average?

A. It depends upon the destination, yes. Eight and a half, nine. Depending on where you were going.

Q. Now, during the course of time that you flew internationally, under this wet lease program,

1846

were you under the care of a family physician?

A. Yes, I was.

Q. Who was that?

A. Dr. Pam Bartels.

Q. Did Dr. Bartels care for any respiratory problems that you had in those years?

A. Yes, she did.

Q. Did she describe for you the conditions or the illnesses that you were suffering from based upon the symptoms and the examination that she performed on you?

A. Yes. I had told her my initial time with her that I had had a history of sinusitis and bronchitis, bouts with that. So she was aware of that. And she -- that is mainly what she treated me for.

Q. Did there come a time when Dr. Bartels recommended that you not continue to fly on flights that permitted smoking?

A. Yes, she did.

Q. And do you recall when that was?

A. I believe it was in -- I was on the wet lease program. It was in the wintertime, January, February, something like that, of 1996.

Q. And I think you told us earlier that you

1847

terminated your flying on the wet lease program in 1996?

A. The contract was completed in May, yes. That is when I stopped.

Q. And after that time, did you fly on any flights where smoking was permitted?

A. No, I did not.

Q. Was the conversation she had with you, in early 1996, the first time that a doctor had recommended that you not fly on flights where smoking was permitted?

A. Yes.

Q. Was there ever a time while you flew as a flight attendant that you believed that your

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exposure to smoke could cause lung cancer?
A. No.
Q. When was the first time that you made that association, either on your own or through a doctor?
A. It was on my own.
Q. When was that?
A. When I was diagnosed with my initial cancer.
Q. And that was in what year?
A. I'm sorry?
Q. In what year, please?

1848

A. 1999.
Q. Now, I would like you to tell me about the circumstances, as you recall them, that gave rise to the diagnosis of cancer. And let me ask you to start with the time when you had a chest film done, CT scan.
A. Yes.
Q. And you had one done before the time of your diagnosis; is that correct?
A. Yes.
Q. When was it, as you remember?
A. Ah, I had had one done in 1998, in the summer. Because I had some stomach problems.
Q. And did you receive a recommendation from a doctor as to what you should do at that point?
A. Dr. Bartels recommended I go see a gastrointestinal surgeon, Dr. Smith, in Asheville.
Q. Well, after you had that CT scan that you just referred to in 1998, was there some recommendation made to you by a doctor as to what follow-up should be done?
A. Yes. They saw something on my right lung, and I was to -- Dr. Morelock at this point had recommended -- I may be confused as to my sequence of events, but a biopsy.

1849

Q. Were the risks of biopsy discussed with you?
A. Yes, they were.
Q. And did you decide on a different course of treatment?
A. Once the risks were discussed, the possibility of a punctured lung and other risks, I asked if there was other options, and the radiologist said, yes. Um, I could wait three months, and then we could, you know, do another CAT scan to see if it had grown.
Q. Did you follow up with another CAT scan?
A. Yes, I did.
Q. And what did that tell you about your condition?
A. That was April -- That it had grown.
Q. And at that point in time did someone provide you with what your next assessment option was?
A. Yes. Dr. Bartels set up a lung biopsy for me in Marion at McDowell Hospital, and Dr. Ende performed that.
Q. Did there come a time when the diagnosis was made through a biopsy?
A. Yes.

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1850

Q. Now, at that time you were not married to Frank Routh, were you?
A. No.
Q. How long had you known him?
A. I met Frank as a crew member in the early '90s.
Q. And, in fact, what was his position with US Air?
A. He is a pilot with US Airways.
Q. And when you were working on the wet lease program, was he also someone employed under that program?
A. Yes, for the most part, he was, yes.
Q. And did the two of you start to date at some point in time?
A. Eventually. We -- ah, ah, went out, did different things together. Eventually it came to that point, yes.
Q. So by the time of your diagnosis, were you more than just friends, co-workers?
A. Yes. We were a couple, yes.
Q. And was Frank with you at times that you were receiving news as to your cancerous condition?
A. He -- Yes. He was there. He came later that day of my first diagnosis. He was flying.

1851

Q. And, in fact, has he been present and participating in some of the treatment decisions that you have made in the last four years?
A. In all of them.
Q. You would say that he was very well aware of what your decisions had been and what you were going through?
A. Yes.
Q. Now, once the diagnosis was made, you went through treatment that included surgery and post-surgical treatment; correct?
A. Correct.
Q. Tell us, if you would, please, how you reacted to the surgery, what it was that you were going through at that time.
A. Surgery, I was hospitalized 14 days. All I can say is that it was the most painful thing that I have ever gone through. And I remember just being -- I remember the pain.
Q. Did they try -- Did they control the pain with medication?
A. Actually, morphine didn't work. It was too painful. They had -- it was an epidural at the time. That was the only thing that seemed to maintain --

1852

Q. And after the 14 days when you were discharged from the hospital, did you continue to have difficulties with the recovery from surgery?
A. Pain, pain management, nauseousness, yes.
Q. At some point in time you consulted with a series of doctors about what your next treatment should be; correct?
A. Correct.
Q. And tell us, if you would, what the options were that were presented to you and how you

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reacted to them.
A. Radiation, my surgeon recommended radiation from the onset after surgery. And Dr. Paschal, my medical oncologist, recommended chemotherapy. I got a second opinion, from a Dr. Savage, who did not recommend at the time chemotherapy. But he did suggest that I do -- have a PET scan done. A more definitive scan than a CAT scan.
So I had that done, and they did see some residual cancer. So then --
Q. That appeared on the PET scan film?
A. Yes, sir.
So he -- So he sent me to a Dr. Blackstock, who saw -- He saw the CAT scans and

1853

conferred with my surgeon. He also recommended the radiation/chemotherapy.
Q. Now, when residual cancer was suspected on the CAT -- on the PET scan, did -- was there any conversation about having more surgery? Or was that not an option?
A. Not that I recall, no.
Q. Tell us what it was like in the days that you had to go through the regimen of radiation.
A. I had approximately 34 treatments, Monday through Friday. At first it didn't bother me. I was put under a big tube thing. It took only a few minutes.
Q. This was administered to you in Mission St. Joseph's?
A. Yes, in Asheville.
Q. So you had to travel from Marion to Asheville every day?
A. My husband took me. Sandy took me at times. And then it started to -- My esophagus and throat got very burned. I had trouble swallowing. And it was very painful. As he described, it was like a sunburn inside.
Q. Show us where it was that you felt the pain.

1854

A. Right here. Throughout here.
Anything carbonated was extremely painful. It is to this day. I can't drink it.
Q. Did the sunburn, as you called it, from the radiation, did that affect your ability to eat and drink?
A. Yes, it did.
Q. Did you find that you were not able to maintain your weight?
A. Yes.
Q. Was there a time that the radiation treatments had to be discontinued?
A. Yes.
Q. Why was that?
A. I was just too burned. They were concerned about my weight. I was just too -- too -- I couldn't eat because it was so burned.
Q. But even though the radiation was having this affect upon you, it was necessary to continue with the radiation, according to the doctors?
A. Yes.

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Q. And there came a time when you went back and had the balance of the treatment?
A. Yes.
Q. Were you hospitalized any other times

1855

during the course of your post-surgical care?
A. Yes. Twice.
Q. And what was that for?
A. The first time, the terminology they used was my electrolytes were way off the chart. I was very weak. I was losing a lot of weight. Very sick.
So Dr. O'Cain recommended me to Mission St. Joseph's. I stayed there for several days. And the next time, pretty much the same situation. I was down to about 100 pounds. I got very sick.
Q. What had you weighed pre-surgery?
A. I think prior to the surgery, about 125, around there.
Q. So your estimate was that you lost 25 pounds?
A. Yes.
Q. Once you recovered sufficiently to be discharged from the hospital, did you undergo a regimen of chemotherapy?
A. Yes. That was in conjunction, actually, with the radiation.
Q. And did the chemotherapy have any physical affects upon you?
A. Not the first time, but it did.

1856

Q. How?
A. Well, actually, it came with quite a vengeance. I was very nauseous, very -- It was beyond any kind of sick that I can describe. It was a lot of pain. It was, ah -- I think, ah, I described it to my husband as -- I didn't know that you could be that sick and still live. Just really sick.
THE COURT: Would you like to take a break?
THE WITNESS: I'm okay.
MR. SILVER: Thank you, Your Honor.
BY MR. SILVER:
Q. Of the symptoms that -- side effects of the radiation and the chemotherapy that you described for us, have they all resolved or are you still having problems with some of those conditions?
A. I'm having trouble maintaining weight, keeping -- My appetite is -- is very small. As I said, I can't drink any carbonated beverages.
Physically, it is depressing. But I still, I'm very -- my stomach is very sensitive to foods, different foods that it wasn't before.
Q. Let me ask you to focus on the time frame that followed chemotherapy that you received until

1857

the diagnosis of recurrent cancer.
You remained under a doctor's care; correct?
A. Yes.
Q. They followed you?
And what was your understanding as to your

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future at that time, what your prospects were?
A. It was going to be limited. I was hoping to go back to work, to try. And I knew my breathing was compromised, my stamina was compromised, my whole being was compromised. But I was hopeful that I could try to return to work.
In fact, I did try one time.
Q. That came when? If you remember.
A. The year 2001.
Q. And just tell us briefly when you attempted to return to work, what happened.
A. In January -- I flew -- We deadheaded over as a crew. We flied as passengers, to position yourself, and I tried working the way back. But I didn't make it passed the boarding stage. I had to sit down.
Q. And has there been any way you have been able to try to do that ever since?
A. No.

1858

Q. The effects that you had from the radiation, swallowing and the coughing, is that something that you live with, have been living with?
A. Yes.
Q. Did you try to undergo some sort of a regimen of exercise or therapy to try to build yourself up in the years following the treatment that you got, chemotherapy, the radiation and so on?
A. I did respiratory rehabilitation in Marion for several months. And I have always done, for years, yoga. To relax me.
And before the surgery I was doing quite vigorous yoga. And since I can't do that, I was doing modified -- trying to breathe to increase my lung capacity. I tried.
Q. Gail, in November of this past year, you had results of a CAT scan that gave you news that there was some possible recurrence; is that right?
A. Yes.
Q. Tell me what you recall about that time frame and how it was that the diagnosis was made to you.
A. I was going for checkups, regular checkups, every six months. And I had had a CAT scan. I left -- I left -- I was at my son's for

1859

Thanksgiving, and when I got back, I believe, was when I found out that it had recurred in my right lung and also in my left lung.
Q. What was done next to find out more about that or to decide what your options were?
A. I believe I went to see Dr. Morelock. Sandy Wheeler accompanied me. And she set me up, I went to Dr. Messino. Um, actually, Dr. Morelock did not give me good news. She pretty much told me it was terminal.
Dr. Messino gave me two options. Chemotherapy, which I had already experienced. And -- or this new drug -- it was experimental at the time, Iressa.
Q. What did he tell you about what he hoped Iressa could do for you or what its purpose was?
A. Well, he said it was not a cure. But if

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it worked, it might shrink or slow down the tumors.
Q. Did he feel that he could provide you with a cure?
A. No.
Q. Have you been told by any of your doctors that you can recover from the second cancer?
A. No.
Q. Have you found -- well, strike that.

I would like you to share with us, Gail, your everyday -- your routine day, if you would. Let's start with the time that you awake. I'm talking about a typical day, not today or yesterday, but a day that you are in [DELETED] at home.

Tell the jury, please, about what your day is like.
A. Well, I usually rise around -- about 8ish. My husband is usually up before I am, so he will already make coffee for me or a fruit shake, and I go downstairs and spend some time with him, have some coffee, a fruit shake.

And after I while, I go upstairs to shower and get dressed.
Q. Your house is a two-story home?
A. A two-story.

So now, after, when I do walk up the flight of stairs, I have to lie down and rest before I can take my shower.
Q. So this is going from, having some coffee to the upstairs to take a shower, you climb?
A. Well, I'm out of breath by the time I get up there, so I have to lie down.
Q. How long do you lie down for generally?

A. Sometimes 20, 30 minutes, 20, 30 minutes.
Q. What is next?
A. Then I take a shower, which makes me exhausted again, because I have the overhead movements with the shampoo and lather.

And then I have to rest after that.
Q. When you say "rest," you have to lie down again?
A. Lie down again.
Q. After the shower?
A. (Nods head affirmatively).

That is a daily routine.
Q. How long is that rest?
A. I rest up to a half hour, depending upon how exhausted I feel.
Q. And then what do you undertake?
A. Then I get dressed. Actually, I have to sit down and get dressed. I don't stand up. I put my clothes on while -- I have them ready so that when I get out of the shower, I can -- after I rest, I can sit there and put them on.
Q. And after you get your clothing on, do you rest again?
A. Yes, a little bit.

Then I go in my guest room and I have a hair dryer that is on the floor. And sit on the floor and dry my hair.

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Q. How long does that take?
A. About five minutes to dry.
Q. And does that require extraordinary exertion on your part?
A. Well, since I'm sitting, it helps, but it is overhead, the movement. Again, that -- that is tiring.
Q. Does it require any rest from that activity?
A. I sit, just sit on the floor for a few minutes, try to do a few stretches.
Q. And after that, what is your next -- typically what is your next activity?
A. I go downstairs. I finish reading the paper. Sometimes I will talk to Sandy. My sisters.
Q. On the telephone or in person?
A. Yes, on the sofa. I spend a lot of time -- most of the times I'm on the sofa. Do emails.
Q. On the computer?
A. Yes.
Q. And are there any other things that you typically do in a morning?

1863

A. No.
Q. So you are typically at home?
A. (Nods head affirmatively).
Q. And the next activity in your day, Gail, is typically what?
A. Well, around lunchtime we -- my husband will either make lunch, go pick something up, or he will bring something in, and I have lunch with him when he's home. Sometimes Sandy is over and has lunch with us.
Q. Are you able to prepare meals?
A. Not like I used to, no.
Q. What types of meals do you generally make for yourself when he's not around?
A. Um, well, my husband does a lot of cooking now. But something quick. Pasta, maybe. I eat a lot of pasta. Takeout or whatever.
Q. Most of your lunches are eaten at home?
A. Yes.
Q. And on your typical or routine day, what is next?
A. Well, I'm usually back on the sofa. I'm watching a movie. I do a lot of communicating with notes. I write to people, a lot of notes and cards, things like that.

1864

Q. Any other activities in a typical day?
A. No. Pretty much -- I mean, when my husband is home at night, we watch the news or TV together, but --
Q. Does there come a point in the afternoon where you rest again?
A. Yes, usually around 2:00.
Q. And at dinner time, do you eat at home most often or out?
A. We eat at home.
Q. And are you engaged in the food preparation then?
A. Not much anymore.

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Q. Do you have dinner most of the time with your husband?
A. Yes.
Q. And what do you do after dinner?
A. We watch TV or one of us is on the computer. Things like that. Read.
Q. And what time is it that you typically go to sleep?
A. I go to sleep probably between nine and ten.
Q. Now, the day that you just described to us is a routine day; correct?

1865

A. Correct.
Q. There are days when you do go outside the home?
A. Yes.
Q. Are there days when you attempt to go beyond Marion?
A. Oh, yes.
Q. Okay. Tell us some of the things that you try to do and how you find yourself reacting to that in terms of your physical limitation.
A. Well, occasionally I like to go to Asheville. But now -- It used to be a run-of-the-mill thing to do, but now it takes a lot of planning, and I have to really think about it, because I know how tired I'm going to be. And I have to plan on sitting a lot, wherever I go, finding a bench, sitting. I mean, I have to pace myself very carefully now.
Q. Have you had occasion to travel outside of North Carolina since your diagnosis of recurrent cancer?
A. Yes.
Q. Indeed, you traveled here; correct?
A. Correct.
Q. Tell us what your limitations are and how

1866

that affects your ability to travel.
A. Well, whoever I'm with has to be aware of that. I can't keep up. I have to go at a slower pace, and I have to find places to rest. I don't want to slow anybody down. Getting ready takes me longer than it will take them. They have to carry stuff for me, my husband.
I'm limited, and I tire easily in the afternoons, so, ah, just a lot of rest involved. I do it because I want to live as much life as I can. It is just more rest involved in it, that is all.
Q. Gail, what did you like most about your career and the quality of your life before your cancer diagnosis?
A. Well, it afforded me the opportunity to travel, the mobility. I'm big on relationships, visiting people, going places with people. So, like with Sandy and I and my friends.
It is not too much in the cards anymore.
Q. And what are your -- What are your hopes and your plans today and for the future?
A. I don't have any. Um, like I don't plan very far ahead at all. Because that would be too presumptuous on my part, and I don't want to set

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myself up for something that might not take place.

1867

Plus, um, I have to have regular checkups, and I am trying, but sometimes I feel like I don't want to be too far away from my doctors and things like that.

Q. Gail, when you were working were you supporting others?

A. Well, I put my son through college. And I help with my sister. I have a sister in Marion that does have a heart condition.

Q. Speaking about your family members for a moment, you have a family member who has had the Alpha-1 antitrypsin deficiency. That is symptomatic; correct? Or that was symptomatic?

A. Yes.

Q. That was the sister that has died?

A. She would have been 53 yesterday.

Q. Your mother, did she have the Alpha-1 deficiency?

A. She was heterozygous, like I am.

Q. Did your mother die from Alpha-1?

A. No.

Q. What did she die of?

A. She had a heart attack.

Q. Has any other family member that you have suffered the symptoms of Alpha-1?

1868

A. I'm sorry. Would you repeat that?

Q. You told us that you didn't suffer the symptoms of Alpha-1, you were merely a carrier?

A. Right.

Q. Are there any other members of your family that have had Alpha-1 that had symptoms other than your sister?

A. My sister, Jeanie.

Q. She's alive today?

A. Yes.

Q. Where does she live?

A. Outside of Albuquerque.

Q. Your understanding is her symptoms and the ones your other sister suffered from are not your symptoms?

MR. UPSHAW: Objection, leading.

THE COURT: Sustained. Don't answer it.

THE WITNESS: No -- I'm sorry.

MR. SILVER: Let me rephrase it.

BY MR. SILVER:

Q. There was a time that you sought out information from a Dr. Brantly in Gainesville, Florida; is that correct?

A. Yes.

Q. Could you tell the jury why it was that

1869

you wanted to see Dr. Brantly?

A. Well, since we spent so much time in Florida, I wanted to have a doctor, another doctor, in the area that I could, if need be, I could visit.

Q. What was your understanding as to his specialty?

A. He is a pulmonologist.

Q. Did he have a subspecialty in a particular area?

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A. Yes, Alpha-1.
Q. You had occasion to be examined by him?
A. Yes, I did.
Q. And did you learn from Dr. Brantly as to whether or not Alpha-1 was contributory at all to your lung cancer?
A. He said it was not at all.
MR. SILVER: One moment, please, Your Honor.
BY MR. SILVER:
Q. One last question. When you learned of the diagnosis of cancer in 1999, did you learn that from Dr. Bartels?
A. Yes.
Q. How were you informed about that?
A. I was on a trip and I asked her to leave a

1870

message on my machine. I was in Baltimore. And I called my machine. She said that she wanted to talk with me about my chest results. So instinctively I already knew. But when I got -- arrived in Charlotte, we were headed -- we arrived in Charlotte and then I went to San Francisco. And I called her on the phone and she told me over the phone. That was early, about 7:30 in the morning, I think.
Q. And was there someone at your home at the time that you arrived home to discuss the situation?
A. She asked me if -- she was going jogging with her group, including Sandy Wheeler, and asked me for permission to tell Sandy. And I said, "Yes, by all means."
So Sandy was waiting for me.
Q. Prior to that time, did you consider Dr. Bartels -- Did you have any relationship with Dr. Bartels other than that as a physician and patient?
A. No.
Q. Was it after that time that you enjoyed the benefit of having her friendship in addition to her professional advice and opinions?
A. Yes, we are friends.
Q. Gail, there was a time -- Can you tell us about an occasion when your friend, Sandy Wheeler

1871

came to visit you and you had packed up some boxes that you intended to mail?
A. Yes. I wanted to do this -- about the boxes, those mail envelopes that you stuff things in. I wanted to do this out of sight of my husband. I wanted to take care of certain things prior to, um, my not being here. I didn't want him saddled with having to go through all of that. I knew it would be too emotional for him.
I decided to -- this means I just wanted to take care of certain things and get it over and done with so he wouldn't be saddled with it.
Q. Were you able to physically do this packaging on your own?
A. Yes.
Q. What was involved with it?
A. It was just scarfs, jewelry. I don't know. There was a jacket I gave my cousin. It was just stuff like that. A shawl.
Q. So you were able to box and seal for

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mailing those things, packages, I should say?
A. (Nods head affirmatively).
Q. Lastly, Gail, given the routine that you typically have, can you tell us how it is that you have been managing the last two weeks in terms of

1872

the necessity to come to court in the morning and spend some time with us?
A. Well, as you know, I haven't been able to attend every day, all day long. Sometimes, um, it is more or less careful planning on my husband's part. He gets me up. I go to bed early, he gets me up. He gets me something to drink, something to eat. He takes me over here. And I tire easily. I have to get to bed, as I said, quite early, because these are long days. I'm not always able to physically make a whole day. A lot of times, I'm trying, but I'm not all of the time able to do that.
MR. SILVER: Thank you very much.
MR. REILLY: Do you want to take a break, Your Honor?
THE COURT: Come sidebar. I don't need the reporter.
(Thereupon, a sidebar was had without the reporter:)
THE COURT: Members of the Jury, we are going to take a morning recess at this point. It will be about 15 minutes. Please remember, don't discuss the case among yourselves.
Remember, don't talk to anyone about the case.

1873

(Thereupon, the jurors exited the courtroom.)
(Thereupon, a recess was taken, after which the following proceedings were held:)
THE COURT: Please be seated.
Mr. Upshaw, are you ready?
MR. UPSHAW: Yes, Your Honor. I'm just making sure Gemma wasn't hollering at me.
MR. SILVER: Your Honor, before we bring the jury back, we just mentioned a logistical problem.
THE COURT: You don't need the reporter.
MR. SILVER: I don't need the reporter.
(Thereupon, a sidebar was had without the reporter.)
(Thereupon, the jurors entered the courtroom.)
THE COURT: Have a seat, please.
Mr. Upshaw, cross examination.
MR. UPSHAW: Yes, Your Honor.
May it please the Court.

CROSS-EXAMINATION

BY MR. UPSHAW:
Q. Good morning Ms. Routh.
A. Good morning.

1874

Q. Ms. Routh, if I might, let me take you back through your education and background. I know you went over that to some degree with Mr. Silver, but I would like to ask you some more questions about that. Okay?

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A. All right.
Q. You talked about your time in high school and the fact you were a pretty good student in high school, weren't you?
A. I was okay.
Q. You made their honor roll quite a bit, I think you told us?
A. Yes.
Q. And after high school you attended one semester at Adirondack Community College?
A. Correct.
Q. And it was after that semester that you were married?
A. Yes.
Q. And you moved to Maryland with your husband. His name was Rhett Ross?
A. Correct.
Q. Because that is where he lived; right?
A. Yes.
Q. In September of 1970, had your son,

1875

Ramsey?
A. 1968.
Q. '68. I'm sorry. I had the wrong date.
Okay. And the summer that you were pregnant, you took classes in Baltimore?
A. I took two in Baltimore.
Q. And after Ramsey was born, you lived with your son and Mr. Ross until about 1972; is that right?
A. Yes.
Q. And at that time you became a flight attendant?
A. Yes.
Q. Okay. Now, you became a flight attendant with Allegheny Airlines. You told us it was a regional, almost commuter airline at the time; correct?
A. Regional. Not commuter, regional.
Q. It wasn't connected with any other big airline at the time?
A. No.
Q. It had its own routes?
A. Exactly.
Q. You moved out on your own in 1972, and over the next eight years, you moved around the

1876

College Park, Maryland, Virginia, DC area?
A. Yes. Basically stayed around the area.
Q. But you kept in contact with your son during that time, didn't you?
A. Oh, yeah.
Q. During the times you lived in College Park, Maryland, that is where the University of Maryland main campus is?
A. Exactly.
Q. And you took classes during that period of time?
A. Yes.
Q. Now, from July '81 through April of '82, you left your job as a flight attendant and took an educational leave?
A. For several months, I believe, yes.

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Q. July '81 to April of '82? Does that sound right?
A. Yes. You probably know more about that timetable.
Q. That was a long time ago; right?
A. Yes, it was.
Q. You were taking nursing courses during that period?
A. Yes.

1877

Q. There came a time, when, I think it has been mentioned a couple of times you lived in Germany?
A. Yes.
Q. And you were on leave from being a flight attendant during the time you lived in Germany?
A. Educational leave, yes.
Q. Now, could you tell the jury, you didn't just up and move to Germany, you moved because that is where your husband at the time was moving because he was in the military and being stationed there?
A. Yes. He was a squadron commander in Germany at Ramstein.
Q. When you were in Germany, you took classes at the University of Maryland extension campus?
A. Yes, they had a big extension there.
Q. One of the classes you took was German?
A. Yes.
Q. In fact, some of the classes US Airways paid for because you were on educational leave to take classes?
A. Not -- 50 to 75 percent, something like that, yes.
Q. They helped out?
A. Uh-huh. They did.

1878

Q. Now, your husband at the time, when he was returning to the United States, you moved to Virginia, then New Hampshire, and then out to Arizona?
A. Correct.
Q. At some point, then, you chose to move to North Carolina. I think it was in 1991; right?
A. That sounds correct.
Q. Okay. And you lived in Charlotte for several months, and then you bought the house in [DELETED] that you told us?
A. Yes. Uh-huh.
Q. And I don't think you told us, but I know you said you met your current husband, Mr. Routh, in the early '90s, and you were married, I think, in 2000; is that right?
A. Yes.
Q. And he had a condominium in Daytona Beach, Daytona Beach Shores. And when you two got together and now you kind of do seasonal living is what you explained?
A. We try, yes.
Q. Part of the time in Marion when it is nice in fall and whatever, and part of the time in Florida?

1879

A. Health and work schedules determine that.

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Q. Permitting?
A. Yes.
Q. You told us you wanted to become a flight attendant because you wanted to travel, you liked --
A. Yes.
Q. -- liked mobility?
A. Yes.
Q. Okay. And over the course of your career you have had the opportunity to travel, haven't you?
A. Yes.
Q. If I think you told us during your depo, you have traveled to nearly every domestic destination US Air flies?
A. It seems like I did, yes.
Q. In fact, you traveled internationally, your job allowed you to do that as well?
A. Yes. Yes.
Q. Now, Allegheny eventually became US Airways through a merger?
A. Yes.
Q. Right?
And during the first eight years you were on the job from 1972 to 1980, you were mainly working three and four-day trips?

1880

A. Hmm, probably that is true.
Q. Okay. Now, I think you explained a little bit during your direct examination. Those were multiple landings per day during that time period?
A. Yes.
Q. And I think you described them as up and downs?
A. Yes.
Q. And you told us about one instance where you had, during a two-day period, 21 takeoffs and landings?
A. That was probably the worst trip, yes.
Q. But normally, as you told us, you would get nine to ten, and on a good trip you would have four to five landings?
A. Yes.
Q. Just so the jury knows, those three- or four day trips weren't continuous. Meaning you weren't working around the clock like a fireman or something, you obviously went to some destination and slept and got up the next day and started your flying again; right?
A. Yes.
Q. And when you were done with a three- or four-day trip, you had a period of time off before

1881

the next trip happened; right?
A. Ah, usually. You had a few -- Schedules varied. It was never -- I might fly three days and then have to go right back out after the next day. I would have two days off, like that. It varied.
Q. Nonetheless, you were flying 75 to 80 hours a month; isn't that right?
A. I went on different options at different times.
Q. Back in the time frame we were talking about, which was 1972 to 1980, you were flying 75 hours to 80 hours a month. That was the option you

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had then?
A. No. When I was first hired, there wasn't an option. I flew, ah, a lot back then, because I was making very little, so 75 hours, I flew more than 75 hours.
Q. Okay. Now, let's clear up for a second what we are talking about when we talk about hours.
And would it be fair to say that through most of your career you averaged 75 to 85 hours a month?
A. Eighty -- I would say 80 to 85 would be more accurate. But --
Q. Okay. Let's understand what that means.

1882

That is called block time; right?
A. Correct.
Q. And for the jury, block time is basically when the wheels of the plane start rolling after they take the block out from behind the wheel when you are at the jetway, until the time that the wheels stop rolling after you have landed and you are back at the jetway; right?
A. Correct.
Q. And during that time, obviously you are not in the air the entire time; right?
A. Correct.
Q. You have got to -- When you roll back, you have got to get out to the runway, so you have some point where you are taxiing; right?
A. Yes.
Q. And then the plane takes off, and I think you have told us up to 10,000 feet the No Smoking sign was on; right?
A. In the early days, when smoking was very prevalent, um, it would go -- the sign would be turned off, the No Smoking sign would be turned off a lot sooner, um, than that, possibly because as soon as -- so many people smoked, and even crew members, flight crew were permitted to smoke. I

1883

attributed it to that.
Now, when years went on, it became standard for 10,000 feet.
Q. For the majority of your career, then, if we want to talk about your career as a whole, when the plane got up to 10,000 feet, the No Smoking sign would go off?
A. Yes.
Q. I think you told us that is about 10 or 15 minutes, in your estimate?
A. About ten minutes.
Q. You weren't clocking it sitting there looking each time the plane took off to see if it is 10 minutes?
A. With flight attendants, everything on the airplane is scheduled.
Q. Okay. Once you are in the area, smoking is allowed, and it is allowed until you get a time when you have to prepare to descend, to come down, and that is when they turn the No Smoking sign back on?
A. Correct.
Q. And then there is no smoking from that

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point until when the plane lands, and that is, in fact, the last time you can smoke on the aircraft,

1884

because you can't smoke from that point in the air all the way through until you get off the plane, that includes the landing and taxiing and all of the time until the block time stops, back when you are at the jetway, the plane is stopped and they open the doors?

A. Correct.

Q. I think you recall during your direct examination that in about 1973 or about a year after you started flying there was a segregation of smokers and nonsmokers on the aircraft; right?

A. Just a sign, yes.

Q. But they were attempting, as they did throughout the '70s and '80s, to separate smokers and nonsmokers?

A. Correct.

Q. Now, during the next three years of your career, 1980 to 1983, you again worked on trips which involved a bunch of landings; right?

A. Yes.

Q. And during this time frame, you took off the job for educational leave for nursing courses which we already talked about.

A. Yes.

Q. And it was during this period you were

1885

working between 70 to 85 hours a month? You would agree?

A. Probably.

Q. And even though you were on educational leave, you were able to retain your seniority; right?

A. Retain -- you did not occur, but you retained, yes.

Q. It wasn't like you had to quit and start at the bottom again, you kept --

A. No.

Q. You kept your space?

A. Exactly.

Q. When you returned to the United States in 1985, you then returned to flying three- and four-day trips; right?

A. Yes.

Q. You did that from 1985 to 1991; right?

A. For the most part, yes.

Q. And, again, for example, through from 1986 to about June of 1990, you were working 75 to -- 70 to 75 hours a month?

A. I was in an option for awhile, 90, 95. So --

Q. You weren't flying that option -- I'm

1886

sorry. Go ahead. I didn't mean to interrupt you.

A. At one time I was in an option, 90 to 95.

Q. You didn't stay on that option very long, did you?

A. I can't remember.

Q. By 1987 you were considered a senior flight attendant, weren't you?

A. To some degree.

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Q. "Senior" meant you would pretty much hold the trips that you wanted?
A. A lot of the times. Not always.
Q. As you told us, if it was 300 in a base, you were moving up to the time where you are now in the senior section, about 1987, so you have a better chance at this point to really get the trips and go where you want to go?
A. It depends on the base also.
Q. Sure. We are talking about the bases that you were at; right?
A. I mean, if you ask me at a certain base, I could probably tell you how senior that base was.
Q. Just in general, you would consider yourself again senior in 1987?
A. To some degree, yes.
Q. It also means that you could, once you had

1887

a trip, determine where you wanted to be on the aircraft during the trip, didn't it?
A. That was a separate position. I could put my choices down. I didn't always get my choice.
Q. Sure. Because somebody traded out on a particular trip and came on that was senior than you, when you got to the plane, and you decided, okay, who is senior, where do you want to go, you may have been bumped down one or two?
A. Well, when you bid the previous month, you are awarded that, you know -- prior -- if you stick to your schedule, you know what position -- No one can bump you.
Q. Okay.
A. If someone senior wants your position, they cannot push you out of it, because you, on paper, have already been awarded that for the month.
Q. Okay. What we are looking at, though, basically during this time frame, the '70s, '80s, is that you are working roughly two weeks a month; isn't that right?
A. Oh, 70 -- No. I would say it was more like 18 days a month.
Q. Okay. Fourteen or 18 days a month. I will give you that.

1888

This also means that you could work on a position in the nonsmoking section of the aircraft if you wanted, when you were bidding for these positions?
A. No.
Q. Okay. When you were bidding for positions, did you bid to avoid working on flights where there was no smoking?
A. I'm sorry. Would you say that again?
Q. When you were bidding for trips --
A. Yes.
Q. -- would you bid for flights where they did not allow smoking? Now, I'm talking about after 1988, when the two-hour ban went into effect. You talked about that with Mr. Silver a little bit?
A. That was impossible to do, because our trips were interspersed with long hauls and short hauls. You just -- you couldn't bid like that. Successfully.

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Q. So what you are telling the jury is basically there are certain -- Let's get this clear, too.

When you bid trips, that meant a three- or four-day swing trips is not each flight; right?

A. Right.

1889

Q. It means a trip is a three-day trip or a four-day trip, that you would have several flights --

A. Yes.

Q. -- included?

And in a particular trip, you are telling us that there may be a short flight, there may be a flight from Charlotte to DC, and then you may go from DC to Arizona.

A. Yes.

Q. Okay. And is it your testimony today, Ms. Routh, that there was no way for you to get more short trips after 1988, that each and every trip that you could bid on had to have some trip, some flight that was longer than two hours?

A. No. I'm just saying that we had several aircraft, and I stuck to pretty much, you know, a few aircrafts. And some had the short hauls in it, like you said, Charlotte to DC, interspersed with the longer hauls. I didn't really look at a trip that way. I mean, I had different criteria, like every flight attendant.

Q. And your criteria during that time, in fact, during most of your career, was to get the longer amount of time off in between flights?

1890

A. No. It varied. When I was commuting, that was one of the objectives.

Q. Okay.

A. And as you get older, it is a very physical job, most of us looked at how long a day was, so if you had 14 hour days, I thought, it was just too long of a day for me. And I would bid maybe a shorter day, try to.

They explained to us in the airlines years ago, a three-day trip for a crew member is equivalent to a 40-hour week. Because we don't have eight-hour days.

Q. Right. Very rarely. You don't have 40-hour weeks either, do you?

A. No.

Q. Okay. Now, during 1989, you took a couple of months off to undergo foot surgery?

A. Yes, I did.

Q. Okay. You made mention during your direct examination that during the time that you were flying, or Mr. Silver, I guess, asked you, did you help others while you were flying, and you said you helped your son through college?

A. Yes.

Q. And your sister?

1891

A. Presently, yes. And I did.

Q. But you weren't staying -- You are not telling this jury that you switched to flying international because you had to help your son

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through college; right?
A. No.
Q. Now, from 1972 to 1992, you worked as a domestic flight attendant?
A. Yes. We had Canada, but, yes.
Q. That was considered domestic at the time?
A. Right.
Q. And since, as we talked about '88, the two-hour ban was in effect; right?
A. Correct.
Q. It meant all flights less than two hours, there was no smoking; right?
A. Correct.
Q. And then in 1990, US Airways banned smoking on all domestic flights?
A. Right.
Q. Right?
A. Six hours or less.
Q. Six hours or less.
That means you could go from Charlotte to Los Angeles or from DC to San Diego, or wherever,

1892

and there was no smoking on the plane?
A. Correct.
Q. And in 1992, you moved your base to Charlotte.
Was that '91 you moved your base to Charlotte, roughly around there?
I'm not going to quibble with you.
A. I believe '92, the winter of '92.
Q. Okay. Now, when you moved your base to Charlotte, you then switched to flying international flights; is that right?
A. Not right away.
Q. But while you were in Charlotte, after '92?
A. Yes.
Q. Okay. And when you switched to international flights, there was still smoking allowed on those flights, wasn't there?
A. Yes.
Q. Now, from approximately 1993, through May of '96, you flew exclusively the Charlotte to London route as part of the wet lease program?
A. Would you run those dates by me again, please?
Q. 1993 to, I think you told us May of '96?

1893

A. Correct.
Q. You flew the wet lease program?
A. Yes.
Q. Do you know where that name came from, "wet lease"?
A. Well, it was over the water and they leased -- it was differentiated between other -- other -- separate programs is what it was. I don't know who attached that name.
Q. And as you have said, you wore a British Airways uniform?
A. Yes.
Q. You were under British Airways regulations?
A. No. We were under our own FARs. Their

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procedures on the airplane.
Q. I'm sorry. I used the wrong term.
You were under their procedures?
A. Yes.
Q. And, in fact, you were operating as a British Airways employee, but you were still employed by US Airways?
A. Correct.
Q. And Frank Routh, your husband, was a pilot in that same program?

1894

A. For most of the time.
Q. You actually flew with him for about five straight years, didn't you?
A. We tried to fly as much together as possible.
Q. And this was a program that, you, as Mr. Silver has phrased it, had to take the opportunity to get into based upon your seniority?
A. Yes.
Q. And then British Airways flights allowed smoking?
A. Yes, they did.
Q. Now, the years you flew on the wet lease program, you flew onboard the 767 aircraft?
A. Yes.
Q. That is a wide-body plane?
A. Correct.
Q. Handles about 210 passengers?
A. Yes.
Q. And it is divided into two sections, the first business class section and then the coach section?
A. That's correct.
Q. Let me show you a diagram of the 767.
MR. UPSHAW: The same one.

1895

BY MR. UPSHAW:
Q. I'm going to try to hold this up, okay.
MR. REILLY: Get an easel.
MR. UPSHAW: Well, I guess we can use that.
BY MR. UPSHAW:
Q. Can you still see that?
A. Yes.
MR. UPSHAW: Can everybody on the jury see that?
Let me get out of the way.
BY MR. UPSHAW:
Q. All right. This is the 767; right?
A. Yes.
Q. So we know, "envoy" was the first class business class section. That is kind of what they called it under British Airways terms.
A. Yes.
Q. And then coach was 179 passengers, and then envoy was 24 passengers?
A. Yes.
Q. So just so we know, I'm going to call it first class, envoy class -- I'm sorry -- was the first four rows?
A. Yes.

1896

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Q. This diagram is correct, basically, is what I'm asking?
A. It looks correct, yes.
Q. Coach class. "G" is the galleys, okay? There was one forward and then one midship and then one aft; right?
A. Yes. The one aft. The mid was a dry galley.
Q. Meaning that -- meaning what?
A. No water.
Q. Okay. All right.
Now, this was a plane you flew for three years during the wet lease program?
A. Yes.
Q. Isn't it correct, Ms. Routh, that smoking was only allowed in this envoy class in the last row?
A. Yes.
Q. And isn't it also a fact that in the coach class, smoking was only allowed in the last two rows?
A. I believe so.
Q. So you only had these two rows and that row where smoking was allowed for the three years you worked on the British Airways program?

1897

A. Yes.
Q. Now, you would agree with me, that doesn't add up to 30 or 40 percent of this plane?
A. No.
Q. Okay.
During the years you worked on the --
MR. UPSHAW: Thank you, Stuart.
MR. SILVER: No problem.
BY MR. UPSHAW:
Q. During the years you worked with British Airways in the wet lease program, you worked mainly in the envoy class, didn't you?
A. I tried to bid the envoy class as much as possible.
Q. Okay. And about 50 percent of the time that you worked aboard the 767, you worked in the first class galley, that front G section?
A. For especially the last year of the three years.
Q. Okay. So not 50 percent of the time?
A. I'm sorry?
Q. My question was, 50 percent of the time that you worked aboard the 767, you worked in the first class or business class galley, the D position, is what you called it?

1898

A. D, G or A, yes.
Q. But specifically the D position was the one in the first class galley?
A. Yes.
Q. That one?
A. Yes.
Q. And when you are in the galley, your tasks are preparing the meals; right?
A. Yes.
Q. For the passengers in the front? And setting up the carts; right?

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A. That was a good part of it, yes.
Q. Okay. And there was no smoking allowed in the galley when you were aboard the 767? In fact, passengers had to be seated before they could light up a cigarette; correct?
A. Yes.
Q. And while you were working on this flight, you did not work with many flight attendants who smoked, did you?
A. Well, they weren't allowed to smoke in the forward galley anyway.
Q. Nobody could smoke in the forward galley?
A. No.
Q. And 20 percent of the time you worked on

1899

the 767, you worked in the position called the A position or the lead flight attendant position?
A. That sounds correct.
Q. Okay. And the lead flight attendant basically stayed in the front of the plane with the first class business class passengers; correct?
A. A good deal of the time.
Q. In fact, if you are the lead flight attendant, you would in time go back to the coach section if there was a problem or some disturbance or something like that?
A. For various reasons, she has to maintain a presence in the airplane. She's responsible for the whole cabin.
Q. Right.
A. Service.
Q. You are the one in charge in the back?
A. Well, the purser is in charge in the back, but the lead flight attendant is in charge of the whole airplane.
Q. That is what I meant.
A. She has to transfer paperwork. Answer -- Complaints of passengers has to go to the lead flight attendant. She might go back there to take her break. There is numerous -- She was a presence

1900

in the cabin.
Q. And that is what I meant by you are in charge of the back. I meant you are in charge of the passenger section --
A. Yes.
Q. -- not the cockpit.
A. Exactly.
Q. And in the rear of the plane, as you told us, the person who was in charge of the coach section was the purser?
A. Yes.
Q. Okay. And you worked on the Airbus, I think you said twice. But isn't it correct that the only time you worked on the Airbus was the one time you tried to go back to work?
A. Um, I think -- I did another flight, a training, maybe, familiarization flight onboard.
Q. Okay. But you couldn't work on it until you had a familiarization flight on it?
A. Right.
Q. Now, there were times when you asked pilots to increase ventilation in the airplane;

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right?
A. Yes.
Q. And if you asked, they would do so,

1901

wouldn't they?
A. Hopefully.
Q. Let's talk a little bit more about these international trips.
The ones from the US leave at -- leave at night; right?
A. Correct.
Q. And a large percentage of the passengers sleep during those flights; right?
A. Not a large percentage, no. After a certain time, people would go to sleep.
Q. Okay. Because they are arriving in Europe or in London in the morning, basically?
A. Yes.
Q. When you get there.
When you left the wet lease program, it actually finished in May of 1996?
A. Yes.
Q. And you returned to flying domestic at that time?
A. Yes.
Q. And there was no smoking on domestic flights, on any US Airways flights when you returned from the wet lease program?
A. That's correct.

1902

Q. In January of '98, you returned to flying international?
A. That sounds right.
Q. You did that because you wanted diversity in the cities that you were traveling to, basically?
A. Yes. And it paid more, was my reason.
Q. Okay. But in January of '98, there was no smoking aboard international flights; right?
A. Correct.
Q. During your career, now I'm talking about your entire career, so we have some time reference, you picked up people's drinking glasses all of the time; right?
A. Yes.
Q. You had to handle people's coats?
A. Yes.
Q. You were working out of a cold weather area. Obviously, if you are working out of Miami, there are not too many coats in Miami?
A. Right.
Q. You had contact with passengers of all ages, including children who flew?
A. Yes.
Q. You handled people's food trays?
A. Yes.

1903

Q. You sometimes, sometimes they left, I think as you said, nasty stuff on their trays; right?
A. Yes.
Q. And you were never allowed to wear gloves while you were performing any of these tasks for passengers, were you?

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A. No.
Q. You were susceptible to germs, weren't you?
A. Everybody was, yes.
Q. You were susceptible to colds?
A. Yes.
Q. In fact, you would admit you caught colds while you were a flight attendant?
A. Sure. We all did, yes.
Q. And even though you caught colds and sometimes had the flu; correct?
A. Yes.
Q. Right. You never exceeded your sick time, did you?
A. I don't believe I did.
Q. There were times also in your career when you were exposed to jet engine fumes or jet engine exhaust; right?

1904

A. Occasionally, uh-huh.
Q. And when you were exposed to secondhand smoke, you never complained to your supervisors about that, did you?
A. No.
Q. Mr. Silver, I think, mentioned Dr. Brantly, who you went to see?
A. Yes.
Q. And you were referred to Dr. Brantly through Mr. Silver; right?
A. Yes.
Q. You saw him in April 2001?
A. Yes, that's correct.
Q. And you haven't seen him since then?
A. I have talked to him, but I have not seen him.
Q. You haven't had a visit or examination or anything since that time?
A. No. Because my health, I stayed pretty much in North Carolina.
Q. Okay. Now, is Dr. Brantly located in Daytona?
A. No.
Q. Do you know where -- where did you go see him?

1905

A. Gainesville.
Q. Gainesville. Okay.
Let me ask you a little bit about some of your family members. You have had a few of them who passed away from cancer; right?
A. Yes.
Q. Your mother's sister passed away. She had breast cancer?
A. Oh, my mother was very young. My aunt was 29.
Q. Twenty-nine. And your Uncle Henry died of cancer as well?
A. Yes. I don't know what kind.
Q. Several of your family members have Alpha-1, I think, as you have mentioned, Alpha-1 antitrypsin deficiency; right?
A. I don't know several. My two sisters, one died. A cousin.

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Q. Okay. Well, let me see if I have got them all here.
Your mother passed away from Alpha-1 antitrypsin deficiency?
A. No, she did not. She died of a heart attack.
Q. She died of a heart attack, but that was a
1906
complication of Alpha-1 antitrypsin?
A. No, she had emphysema. She was heterozygous. She did not die from Alpha-1.
Q. Ms. Routh, do you recall when I took your deposition, do you remember when we did that?
A. Which one?
Q. September 6th, 2001.
A. Yes.
MR. UPSHAW: Counsel, I would like you to turn to Page 13 and I will start at Line 15.
BY MR. UPSHAW:
Q. Ms. Routh, will you tell me if you recall these questions and answers from that deposition?
"Question: And what was your mother's name?
"Answer: Lucille Beatrice.
"Question: Ormsbee?
"Answer: Orsmsbee Fitzgerald. She remarried."
Now I'm going to skip down a little bit.
On Page 14, Line 2:
"Question: And what was the cause of her death?"
And your answer, Ms. Routh, was:
"I believe the death certificate said
1907
heart attack. She had several heart attacks. She had a weakened heart."
My question was, "Was she sickly at the time?"
You said, "Yes."
My next question:
"What was she sick from?"
And your answer was: "She had Alpha-1."
My question is: "Alpha-1 antitrypsin?"
Your answer: "Yes."
My question: "So what was she suffering from, the Alpha-1, some type of respiratory problem?"
Your answer: "It is a lung deficiency."
"Question: Do you know what type of lung deficiency she was suffering from?"
Your answer was: "Well, it is an enzyme deficiency. It was on oxygen and her heart weakened to the point where it just basically had a series of heart attacks and she died."
A. Right.
Q. Do you recall that?
A. Yes.
Q. Okay.
A. May I explain something?
1908
Q. Sure.
A. Okay, since that deposition, I have spoken with my other sister, Jeanie.

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Q. Okay. You can't tell us what Jeanie said, now?
A. Well, I was erroneous in that statement in there that I thought was true. Um, my mother had emphysema, not the Alpha-1.
Q. Okay. That is what you told me back in the deposition?
A. Yes. I'm just saying I was wrong.
Q. All right. Now, I think you told us that your sister, Judith, had Alpha-1?
A. Yes.
Q. Alpha-1 antitrypsin deficiency.
And she underwent a lung transplant for that?
A. Yes, she did.
Q. She survived the lung transplant for about a year before she passed; is that correct?
A. She survived it well for about a year and then she had rejections, infections. And she died, I believe, in 1995.
Q. Okay. I think you mentioned your cousin, Mr. Keast?

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A. Yes.
Q. He has the deficiency? And Mr. Keast is deceased as well?
A. Yes.
Q. And your other sister, Jeanie, has the Alpha-1 antitrypsin deficiency?
A. She has two genes, yes.
Q. She's taking medication for her deficiency?
A. Yes.
Q. Now, you know Sandy Ross came to testify, she's your longest best friend?
A. Yes. I have known her since I was seven.
Q. And Sandra Wheeler, we just heard from today, who I think is still here, is your neighbor and friend; right?
A. That's correct.
Q. And Pam Bartels is also your friend, Dr. Bartels, isn't she?
A. Pam is a friend of mine, yes. Not close, but we are friends.
Q. Well, in fact, you saw her in Myrtle Beach on vacation, didn't you, with Ms. Wheeler?
A. We -- We spent one night there, yes.
Q. She's been there. You have seen her out

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of town. She's more than just your physician?
A. Yes. Yes.
Q. And you have asked each of those people to come and testify on your behalf; right?
A. Yes.
MR. UPSHAW: Your Honor, if I could have one moment.
THE COURT: Yes, sir.
MR. UPSHAW: I have no further questions.
THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. SILVER:
Q. Gail, were there times that you lived in cities different than the city where you were based

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Source: https://www.industrydocuments.ucsf.edu/docs/pygl0001

for US Air?
A. Yes.
Q. And in order to work on the flight schedule that you had as a flight attendant, were you required to fly from your home to your base city?
A. Yes.
Q. And in the years prior to 1988, did that require you to fly on flights where smoking was permitted?
A. Yes.

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Q. Were you exposed to smoke from cigarettes in those flights where you flew as a passenger as well as the flights that you flew as a flight attendant?
A. Yes.
Q. Did you notice anything different about the conditions on those flights than you did, as you described to the jury, when you were working as a flight attendant?
A. No.
Q. Now, you were asked some questions about the number of seats that were designated as smoking seats on the 767 when you worked for British Air.
A. Yes.
Q. On that -- During those years of your employment, were those years in which you found that persons, in addition to those seated in those rows, would smoke?
A. Yes.
Q. And tell the jury, again, for that particular set of years on that aircraft, what you remember seeing in terms of the extent of smoke in the air.
A. Basically the seats over the years were reduced. But the situation remained the same, the

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smoke, prevalence of smoke, the atmosphere remained constant. I mean, it wasn't -- and a lot of times people, as I said, wanted to sit in smoking, went to the back to trade with passengers so they could have a cigarette. It was basically the same. The smoke was just there.
Q. Did you ever see -- The smoke that you observed on the cigarette, ends of the cigarettes that were being smoked by passengers that you were serving, did you notice the direction in which that smoke was traveling?
MR. UPSHAW: Objection. Beyond the scope.
THE COURT: Overruled.
THE WITNESS: Yes, it just normally goes up.
BY MR. SILVER:
Q. Similarly, did you have occasion to see the direction of smoke that was exhaled by the smokers on the flights that you took?
A. The same direction.
Q. And the smoke that you saw in the cabins on these flights and in earlier years was congregated where?
A. Up in the air, on the walls. I mean, you could tell the discoloration, you know, where the

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smoke went.

Q. During the flights that you took overseas on these intercontinental flights you said would last between eight and nine hours, was there ever a time the smoke was cleared by any mechanism out of the aircraft?

A. No.

MR. SILVER: Thank you.

THE COURT: Members of the Jury, any questions of the witness?

Thank you, ma'am. You may step down.

MR. SILVER: No further questions.

Your Honor, at this time we would like to offer, I believe it is marked as our Exhibit 128 on our list. It is the web site information from the Philip Morris web page.

THE COURT: Any objections?

MR. REILLY: Could we come sidebar, Your Honor?

THE COURT: Miss Reporter.

(Thereupon, the following proceedings were had at sidebar:)

MR. REILLY: Just on the basis of foundation, Your Honor.

THE COURT: The foundation that you want

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them to establish is? What do you think he has to do besides testify that he drew it from some publicly posted web site?

MR. REILLY: Is that what he's going to do?

THE COURT: I don't know.

MR. SILVER: If you want me to.

THE COURT: I mean, are you disputing the accuracy of the document?

MR. REILLY: I'm just making an objection.

THE COURT: Your objection is --

MR. ENGRAM: Your Honor, I would pose an objection. I don't know what the basis is for the admission of this document.

THE COURT: Well, let me read it. Because it is an admission against interest.

MR. ENGRAM: It is an admission against Philip Morris. It is prejudicial to admit it as an admission against RJ Reynolds.

THE COURT: Okay.

MR. UPSHAW: I agree with that on behalf of Brown & Williamson.

THE COURT: All right.

MR. SILVER: True. There can be limiting instruction.

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THE COURT: I will give a limiting instruction saying that this is evidence only as against Philip Morris and not as against the remaining defendants, and I will name them.

MR. ENGRAM: I don't think it is an admission --

MR. REILLY: That poses a real problem.

THE COURT: Let him give his opinions.

MR. ENGRAM: I don't believe it is an admission. I don't want you to give a limited

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instruction that it constitutes an admission.
THE COURT: I understand.
So my alternatives are to admit it with no instruction, to admit it with a limiting instruction saying it is applicable as evidence only against Philip Morris USA, or not admit it.
MR. ENGRAM: Right. And in order to admit it on the grounds of whatever probative value it has against Philip Morris is a prejudice to us.
THE COURT: That is spilling over to you? Do I have that right?
MR. REILLY: There is another problem here. You can't admit it only as to Philip

1916

Morris because there is no apportionment of responsibility in this case as these folks have characterized this case.
THE COURT: That is interesting. That is true.
Response?
MR. SILVER: Well, I think there is with the limiting instruction saying that it is being offered as to Philip Morris.
THE COURT: Well, I think his argument essentially comes back to the jury can find -- that is --
MR. REILLY: They can't.
THE COURT: Can the jury find only as one or two or three defendants, but not all?
MR. REILLY: Not the way you structured this, and the way you structured this, there is no opportunity to find only against one.
THE COURT: We haven't structured it yet. The verdict form hasn't been approved.
Has anyone considered some and not all of the defendants may be liable?
MR. SILVER: That has not been the experience in the past.
THE COURT: Right.

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MR. SILVER: We can certainly --
THE COURT: Seven versus 17 in this case. That is something new.
Okay. I will tell you what --
MR. SILVER: It is certainly probative.
THE COURT: I want to think about it a little bit. So let's hold it and I will decide it before the jury comes back.
What else do you have before we break?
MR. SILVER: I would like to publish the mortality tables.
THE COURT: That is easy.
MR. SILVER: I would like to offer the -- the operative report of Dr. Brantly.
MR. REILLY: Is there some reason you are not putting the medical records in?
MR. UPSHAW: We talked about having the opportunity, we have a whole book of medical records.
THE COURT: Is this all going to take about a minute, if it is admitted, simply hand

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it to the clerk to have it marked in the jury's presence?

Why don't I let the jury go to lunch now and we can take it all up. Stay there.

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(Thereupon, the sidebar was concluded and the following proceedings were held in open court:)

THE COURT: Members of the Jury, we are going to go now. We have some matters to take up. It is pointless to have you sit around.

We are going to give you a break until 1:00.

When you come back, please remember to go directly to the jury room. Don't talk to anyone about the case. We are essentially fairly close to ending the plaintiff's case in chief.

Thank you very much. Have a good lunch.

(Thereupon, the jurors exited the courtroom.)

THE COURT: Mr. Silver, this is the Philip Morris USA web site that you have offered into evidence.

Is this the only web site that you intend or other publicly disseminated document from any of the defendants?

MR. SILVER: Well, given the concern that was raised at sidebar, we may take a look at some others. This is the one I had at hand.

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We may take a look at others.

THE COURT: This is the only one that at this moment anyway you are going to be offering for the purpose of an admission against interest?

MR. SILVER: Exactly.

THE COURT: Recognition by the defendant, Phillip Morris USA, of the dangers of secondhand smoke.

MR. SILVER: Yes, sir.

MR. ENGRAM: Your Honor, I point out, there is no other document from the Reynolds web site on their exhibit list.

MR. UPSHAW: The same for Brown & Williamson.

THE COURT: There aren't going to be any others, is what you are saying?

MR. GERAGHTY: Lorillard doesn't have a web site.

My client, Lorillard does not have a web site along the lines of what you are looking at.

THE COURT: Correct.

Okay. I want to think about it over lunch.

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What else do we have to take up now?

MR. HUNTER: We have the admission of the Surgeon General's 1986 report on involuntary smoking, which we have argued at length.

Judge, I have an additional basis for offering this.

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Mr. Reilly's cross-examination of Dr. Messino was replete with questions to him concerning the state of medical knowledge and whether medical -- whether we are learning things every day and whether research is ongoing.

THE COURT: The answer was yes.

MR. HUNTER: And the clear implication of the questioning, and I have it here, is that the epidemiologists and the science that is progressing is to the -- is for the position that secondhand smoke is not, as we learn more, secondhand smoke is not -- I had it highlighted. I have one that is highlighted.

That as science progresses, secondhand smoke is not as -- that it is not like it was -- it is not like it was in 1986, that science is progressing, and we are learning more, and it is showing that secondhand smoke

1921

is not a cause of lung cancer that it was thought to be.

And I think --

THE COURT: I think it is more fairly phrased by saying that they have not been able to demonstrate in the more recent surveys, tests, scientific studies, that secondhand smoke is a cause, that it is -- that it is more -- more likely to cause these injuries?

I think the basis for that has got to be the studies of flight attendants which showed no increase in lung cancer.

MR. HUNTER: Well, you are going to hear the other side of that issue when I cross examine their people. I would --

THE COURT: You are going to refer to other studies that show otherwise?

MR. HUNTER: Yes, in fact, it is clear.

THE COURT: All right. So we have got a nice fact finding for the jury.

MR. HUNTER: Let me point out to you the web site, if you see the first reference that they refer to is the World Health Monograph of 2000. I believe it is 2002.

THE COURT: Yes.

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MR. HUNTER: That demonstrates the clear association between secondhand smoke and lung cancer.

THE COURT: Okay.

MR. ENGRAM: That is simply a press release.

THE COURT: Let me understand that. Why is that an additional argument to admit into evidence the 1986 Surgeon General's report which includes references to secondhand smoke?

MR. HUNTER: I've highlighted all of these questions that were asked of this doctor, but the questioning of the doctor on cross was, what -- what is the state of medical knowledge concerning the association between lung cancer and secondhand smoke?

And the state of medical knowledge and the

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testimony that I would offer by the Broin videos is that there is no longer any controversy in the medical community.

THE COURT: Come on back to the 1986 Surgeon General Report. It is 17 years old. You are referring to when your cross-examination comes of their experts to much more recent studies. He's referring to

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much more recent studies which he says show that there is no connection between exposure to secondhand smoke and increased risk of lung cancer or other lung diseases.

Why is a 17-year-old study going to take -- prove one side or the other?

MR. HUNTER: Well, because it keeps being reiterated, the findings of that study are reiterated yearly or whenever the Surgeon General's reports come out. They don't recede at all from 1986.

THE COURT: That is not a reason to let it in. Nobody has backed off it in later Surgeon General's Reports, so I should let in the original Surgeon General's report that related to it? That is not a good reason to let it in.

MR. HUNTER: Well, the reasons are, Judge, that it is highly reliable. It is a compilation of 61 researchers that studied the issue of secondhand smoke. It is, you know, all of the reasons that I have -- you know, it is -- it is all of the reasons that I argued before and that is that it has been admitted in every other trial. It is reliable. It is not hearsay. The Court should take judicial notice

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of it. You know, all of those other reasons it is the ultimate authority on the issue.

There is no legitimate science that contradicts the findings of the 1986 Surgeon General's Report. There is none.

MR. REILLY: Your Honor --

THE COURT: That smile says you don't believe that.

MR. REILLY: Mr. Hunter's argument is great closing argument for a jury, but it is not what makes this document admissible or not. What makes this document admissible is whether it is an exception to the hearsay rule, because it is clearly hearsay. It is an out-of-court statement. It is not an exception to the hearsay rule.

MR. HUNTER: We noted --

MR. REILLY: We demonstrated to Your Honor that it falls under what could have been adopted by the state of Florida as an exception to the hearsay rule which -- which the federal court has, but which the state of Florida did not. And Professor Ehrhardt, who I gave you the -- I forgot the name of the case at this moment.

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MR. ENGRAM: Lee versus Department of Health and Rehabilitation Services.

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MR. REILLY: Thank you.

That talks directly about the failure of Florida to adopt Type III of the government documents or reports that could constitute an exception to the hearsay rule. But Florida didn't adopt it. The federal court did, the State of Florida did not.

And then I went through the Surgeon General's Report and showed you where it is a compilation of conclusion, opinions, things of that nature, which is exactly what Type III government documents that could go in and get admitted as a document in federal court as an exception to the hearsay rule, but you can't get done here in the State of Florida.

MR. ENGRAM: Your Honor, Mr. Hunter said that it has never been excluded in a case. In the Connor case, in Jacksonville, there is an attachment to our motion in limine showing the Judge's reasoning along these lines, saying that Florida didn't adopt it, and it was not admitted into evidence in Connor.

MR. HUNTER: That is true. That case, it

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was not admitted. That is a direct smoking case out of -- in Jacksonville or someplace else.

In every secondhand smoke case, with the exception of the French case, it has been admitted, and it would have been admitted in the French case if it had addressed the issue of sinusitis, which was the disease in that case, and it didn't.

MR. REILLY: Judge Smith did not admit --

THE COURT: Let me read that material again during lunch.

MR. HUNTER: Judge, here, could I give you a highlighted version of the cross-examination of Dr. Messino? Just let you see if that didn't --

MR. SILVER: If I might add one supplemental note, it applies both to the Surgeon General's Report as well as to the web site. These were both listed pursuant to the court order that required us to identify exhibit months and months ago.

The only objections we ever heard from the defense to those exhibits were two in number, one had to do with the medical bills, which we

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have corrected, we now have an agreement on, and we will offer that this afternoon. The second was a timeline, which we never assembled in a fashion that became --

THE COURT: Are you saying he was obligated to file an in limine motion on that?

MR. REILLY: And I did. And we have argued it. I argued it to Judge Solomon. I argued it to you.

MR. SILVER: I'm saying there was no in limine motion, certainly not on the web site. Today is the first day that anything has come up.

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THE COURT: I have overruled his objection. It is the other objections that I'm concerned about.

MR. SILVER: I understand.

MR. REILLY: No one is obliged to file a motion in limine in every single document that might come up.

THE COURT: All right.

MR. SILVER: I'm just saying it comes as a surprise. That is all.

MR. HUNTER: Judge Siegel did rule that there was an identity of interests on the part

1928

of the defendant that is why he limited the amount of strikes they have to exercise.

MR. REILLY: That has nothing to do with --

MR. HUNTER: It has to do with the admissibility of the document.

THE COURT: It has to do with whether or not objections by one to the admissibility then would apply in this case.

Okay. I understand. I will read it. Thank you. 1:00.

How long will you be before you rest?

MR. SILVER: I would think 3:00 at the latest.

THE COURT: Do you have any testimony you are going to put on this afternoon?

MR. REILLY: No. As a matter of fact, we figured we would argue, maybe we would argue motions for directed verdict.

THE COURT: That is fine.

MR. SILVER: My feeling, Judge, we have a short witness that we have described her testimony to you already.

THE COURT: How tall is he?

Every judge I ever knew always said that.

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MR. HUNTER: Let's say I win the argument on the Broin videos -- This seems like is -- like we are assuming I'm going to lose that argument. If we show videos, I have got about an hour and a half to two hours --

THE COURT: That was your trial partner.

MR. SILVER: That is why I started to lay it out for you. I'm thinking a half hour for Ms. Hannan, an hour for Frank Routh, then a half hour to show whatever experts testimony.

THE COURT: Before we break again, give me the very short version of the Broin video argument.

MR. HUNTER: Well, starting with the Ramos decision, it identifies that there is a shifting of the burden of proof, which they refer to as a presumption on generic causation, which is one of the elements that Judge Siegel has said we have to send to this jury and they have to rule upon.

All of my testimony that I have in preparation for the issue of generic causation is in the Broin videos. I didn't have any on generic causation, I didn't hire any witnesses

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to address that issue, I used treating

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physicians, with the exception of Dr. Roggli, who I needed on the pathology.

THE COURT: There is reference in the settlement agreement to the use of witness evidence in the Broin case.

MR. HUNTER: The Broin videotapes specifically are referenced.

THE COURT: And it says, as I recall it, they are usable in other proceedings.

MR. HUNTER: Yes.

THE COURT: Provided they are otherwise admissible.

MR. HUNTER: Yes. And it says that they are. That is one of the substantial benefits of the settlement.

THE COURT: All right, sir.

MR. HUNTER: For some reason I'm being limited in this case in proving this by just three witnesses. And I don't see any justification for --

THE COURT: Three witnesses for the purpose of proving, expert witnesses for the purpose of proving --

MR. HUNTER: Causation.

THE COURT: -- secondhand smoke exposure

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can cause cancer?

MR. HUNTER: Right. I have never understood that ruling. I don't know why I shouldn't be able to use the Surgeon General --

THE COURT: Wait. The limit of my ruling was simply that you have three experts for that one issue. Not three experts for both issues. Just the one issue of proving it generically.

You have three experts available to you, if you want, for the purpose of proving it caused her cancer.

MR. HUNTER: I have done --

THE COURT: You could have six people with degrees after their names testify as to those two issues.

MR. REILLY: No, Your Honor, that is not what you ruled. What you ruled, and you gave them the option, you said three people to talk about both issues. And you said -- This is what you ruled. I can give you the transcript.

What you said was, I'm going -- I'm going to change the ruling to the extent that you can now, if you want, do away with Dr. Messino to talk about causation, and you can use one of the Broin videos. And immediately Mr. Hunter

1932

said, "Do I have to do that?"

And you said, "No, it is up to you, it is your choice."

THE COURT: Wait a minute. Tell me again what you understood my ruling was for the purpose of those two issues, first generic causation, second, specific causation, as to the number of witnesses who can testify and given an opinion on?

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MR. REILLY: Three witnesses. You followed Judge Solomon who said, "You get three."
THE COURT: Yeah.
MR. REILLY: To talk about generic causation, specific causation --
THE COURT: Three together. Three together?
MR. ENGRAM: Yes.
MR. REILLY: Three people total. Mr. Hunter has acknowledged in his argument today he knew it was three people total.
THE COURT: Okay.
MR. REILLY: Then you said, "I will change it, I will let you adopt another one," not another one, but I will let you substitute,

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Messino is out. You said "Messino is out, and you can pick one of the Broin videos to show, if you want."
Mr. Hunter said --
MR. HUNTER: I never understood that.
MR. REILLY: Oh, my goodness.
MR. HUNTER: Even today as I sit here --
MR. REILLY: He just stood there in front of you and said, I'm not saying --
MR. HUNTER: I'm not saying you didn't rule that. I thought that you had.
MR. UPSHAW: You ruled --
MR. HUNTER: I never conceded that I was not going to -- remember I said --
THE COURT: You are getting me thinking about it again. You are getting me thinking about it again, and, of course, what troubled me from the beginning is, I don't understand how those two issues can exist separately.
MR. ENGRAM: That's right.
THE COURT: If you have got to prove that her exposure to secondhand smoke caused her cancer, by definition it causes cancer. Why is it two issues? Why isn't it one issue?
MR. REILLY: It is one issue. And every

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one of his witnesses -- He said he didn't hire anybody to talk about general causation. The first question he asked --
THE COURT: I'm satisfied. I remember it now. It was three witnesses for that purpose because I felt very strongly, and still do, that I don't understand why it is two issues, generic and specific.
MR. HUNTER: Judge --
THE COURT: It is specific. That is what you have got to prove.
MR. HUNTER: Could you hand that transcript back to make one point and then I will --
THE COURT: Yeah.
MR. HUNTER: Mr. Reilly asked this question.
THE COURT: Give the Page.
MR. HUNTER: At Page 1078.
"Doctor, in addition to not reviewing the

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literature on secondhand smoke and lung cancer," and why he said that, I will never know, because he did review the literature for me, but he said that.

He said, "You have never done any research

1935

on the topic of secondhand smoke and lung cancer, have you?"

He says, "I have not."

And he goes -- and then, question, going on to Page 1079:

"And you know in this case Mr. Routh -- Ms. Routh and her lawyers are maintaining workplace exposure, secondhand smoke gives rise to lung cancer. You understand that that is a claim?"

"Yes.

"But that is not an area that you have expertise in?

"Answer: It is not an area that I have written on. It is not an area that I have done research on.

"Question: But there are people who have done research in the area and have written on that subject?

"Answer: That is correct.

"But you are not one of them?

Well, I have them. And I can't, under this ruling, I can't call them. I have the senior scientific editor of the Surgeon General's Report who has researched this whole

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thing, and if this ruling stands that Mr. Reilly is so happy with, he gets to cross examine my witness by saying, "You are not an epidemiologist. You are not a research scientist. And you don't know what you are talking about."

And the doctor almost just threw up his hands and said, "You are right, I don't." But I do have these witnesses. I should be able to present to this jury --

THE COURT: You were the one who put him on to ask him the opinion about it causing cancer.

MR. HUNTER: I said --

THE COURT: Isn't that the sum of it? You put him on and got that opinion out of him on direct and he attacked it on cross. Now you want another witness to come in and bolster that opinion.

MR. HUNTER: I want an epidemiologist to testify --

THE COURT: The last thing I want to do is prevent you from putting your theory of this case to this jury. That is exactly what you are entitled to do. It is simply a question of

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degree. I limited you to three. And you chose the ones you want.

MR. HUNTER: Because I have two issues. I have to prove specific causation, and I have to prove general causation. You prove general

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causation through epidemiologists. I haven't called an epidemiologist yet. I haven't called the people who have researched the toxicity in human subjects and animal subjects.

And the thing is, that is inconceivable to me from a logical basis, we are talking about three hours of testimony. This has all been edited down. It is three and a half hours of testimony.

Why should -- and, Judge, what I said to you is when -- wait until you see the cross-examination of my witnesses, and at that moment you will realize why it is so critical for me to be able to call the epidemiologists and the -- I forget the other specialty -- there are different specialists. Every one of my witnesses I'm offering is in a different specialty.

But -- I -- and then they are going to put on their witnesses who have done all of the

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research, have charged 50, $60,000 per witness, and they are going -- they are going to say, well, you see, here, we offered you all of this evidence and they didn't, they offered you Dr. Messino who said he didn't even read the literature.

But I have all of these experts that have read the literature and for some reason, the ruling that Mr. Reilly is arguing would prevent me from calling them, and they were specific -- I mean, I should never have had to make an election between Dr. Messino and Dr. David Burns, the editor of the -- because if I had not called Dr. Messino, I wouldn't have had a witness on specific causation. Dr. Burns never saw the plaintiff in this case.

MR. REILLY: That is absolute nonsense. He asked all three of his people to talk about specific causation. I can't believe he just said what he said, Your Honor.

He asked Dr. Roggli, "What is the cause of Ms. Routh's lung cancer?"

Secondhand smoke.

He asked Dr. -- Mr. Silver asked Mr. Brantly, "What is the cause of Ms. Routh's

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lung cancer?"

Secondhand smoke.

"Dr. Messino, what is the cause of Ms. Routh's lung cancer?"

Secondhand smoke.

MR. HUNTER: All specific.

MR. REILLY: He said he needed --

THE COURT: Dr. Roggli, secondhand smoke can cause lung cancer and did cause the plaintiff's.

Dr. Messino --

MR. HUNTER: Look a little harder for him.

THE COURT: On redirect believes cancer was caused by her exposure to secondhand smoke and it is in combination with her genetic predisposition. Dr. Brantly.

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Her condition is not a cause of her lung cancer as to Alpha-1 antitrypsin. Her exposure to secondhand smoke played a role or was a cause of her lung cancer. Based on -- she has large cell carcinoma. He also opined BAC cancer is also related to tobacco smoke.

MR. REILLY: As did Dr. Roggli.

MR. HUNTER: But the point I'm trying to make, Judge, none of these witnesses had done

1940

the original research.

THE COURT: Yeah.

MR. HUNTER: But my other witnesses have. And that is one.

THE COURT: All three of them have opined on the cause of her cancer. And a couple of them have opined in addition on the cause of cancer generally being related to secondhand smoke.

All right. I will think about it again over lunch. But I have got to tell you, it doesn't strike me that it is unfair to you, because you don't like the quality of your witnesses in retrospect. That is what I hear you saying.

MR. HUNTER: Well, the thing is, you can't -- no plaintiff can afford to spend $50,000 per expert when --

THE COURT: You will make hay then.

MR. HUNTER: When you would have them on videotape.

THE COURT: You will make hay out of that, I know, when his witnesses get up to testify. That is typical stuff --

MR. HUNTER: Judge, the benefit of the

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settlement was that I could use these videotapes from the Surgeon General --

THE COURT: Sure. You wouldn't have to go out and spend money on it, but you chose instead, as I understand it, and logically, to get witnesses who know the plaintiff.

MR. SILVER: But what is inherent in the ruling, Your Honor, and I think this is what separates things here, we had to be able to go to the treating physicians and get a specific causation opinion. These physicians are in different specialties, but they know Gail and they know her best, and they talked about specific causation.

The limitation to do that requires clinical physicians who are not -- don't have the time, don't have the ability, don't have wherewithal.

THE COURT: Ultimately for someone to testify this exposure caused her cancer means that they would not only have to have been the treating physician, but have all of the cachT, the criteria for the generalized opinion.

MR. SILVER: And the time to do it.

MR. HUNTER: If they take these doctors'

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deposition for eight and 10 hours.

http://legacy.library.ucsf.edu/tid/wqq67a00/pdf Source: http://www.industrydocuments.ucsf.edu/docs/pygl0001

THE COURT: So your argument ultimately is --

MR. REILLY: Actually, Your Honor, the truth is, you gave them -- You put your finger right on it just a little bit ago. And that is, in retrospect, they don't like their decision that they made a week, two weeks ago by Dr. Messino.

THE COURT: I understand.

MR. REILLY: That is really the fact.

THE COURT: I will think about it over lunch. Thank you.

(Thereupon, a luncheon recess was taken, after which the following proceedings were held:)

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